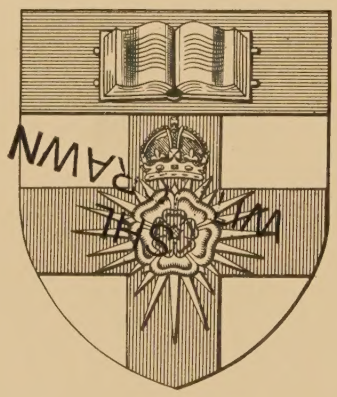

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THE BRITISH YEAR BOOK OF INTERNATIONAL LAW

PUBLISHED BY THE JOINT COMMITTEE OF
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1920–21

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INTRODUCTION

This Year Book of International Law has been established because its promoters feel that a wider knowledge and comprehension of the subject is essential at the present time, and that a British periodical devoted to international law would help to this end.

The war has left in the minds of many people the belief that international law is a thing of the past, and therefore it behoves all those who believe that it is still a living force to work for that " firm establishment of the understandings of international law as the actual rule of conduct among Governments " which, in the words of the Covenant of the League of Nations, the Allied Nations are pledged to regard as a means of achieving international peace and security.

If, however, it is true to-day that international law is a living force, it is equally true that the experiences of the last few years have shown that much that was regarded as definitely established must be re-examined in the light of modern developments. It is patent to all that the progress of science and the advance of commerce have vitally affected the old rules of war and of neutrality. May it not be the case also that the creation of a League of Nations, and the powers conferred upon the organs of the League, will necessitate the readjustment of some of the primary rules on the subject of sovereign independent States ?

Study and thought must be devoted to all these questions. There is much room for difference of opinion, but discussion is essential, and the purpose of the Year Book is to provide scope for well-informed and careful contributions to the science of international law, wherein the fruits of research can be applied to the problems of the day.

If this purpose is to be fulfilled, the Year Book must above all be absolutely independent. It must be in no sense an official organ, and it must be dependent neither on Governments nor on private organisations.

Independence, unfortunately, introduces an element of risk. The Year Book must depend for its continuance on the copies which are sold to the public, and the Editorial Committee therefore beg that all those to whom the idea of the Year Book appeals will support it by becoming subscribers and will do what they can to increase its circulation.

The members of the Editorial Committee do not make themselves in any way responsible for the views expressed by the writers of the articles, whether those articles are signed or unsigned. The Committee are only concerned to see that the articles are worthy contributions to the science of international law.

July 1920.

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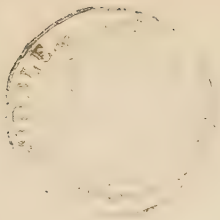

PROFESSOR OPPENHEIM

By E. A. WHITTUCK, B.C.L.

THE number of writers who are generally recognised as authorities on international law—never a large one—has of late been sadly diminished by death—death in most cases hastened if not brought about by the anxiety of the war.

Among these losses that of Dr. Oppenheim, the Whewell Professor of International Law at Cambridge, who died last October, is one of the most serious. At the present time, when the principles of international law are under consideration, his co-operation in the work of re-establishing them will be greatly missed, since there is no one whose opinion on the subject would have carried greater weight. His wide acquaintance with international jurists abroad and with their writings made his presence in this country particularly valuable, and it seemed especially important that he should live to revise a new edition of his well-known treatise in the light of changed circumstances. Fortunately he was able to do a good deal in the way of preparing it before he died, a task in which he was busily engaged till he was taken ill, and which may have overtaxed his strength.

His unexpected loss, felt in so many ways, has been a great set-back to the work of establishing *The British Year Book of International Law*, in which he took a principal part from the time of its inception. His advice as to the form which the publication should take and as to the method to be followed in carrying it on was especially valuable on account of his experience of similar undertakings abroad. He was looking forward to becoming an active member of the editorial staff of the *Year Book*, and by contributing an article to each successive number, as he had promised to do, he hoped to assist in maintaining its

scientific character at a high level, an object which he considered to be of the first importance.

Let us endeavour now to recall the main features of the life of this distinguished Professor. He was born on March 30, 1858, at Windekken, close to Frankfurt-on-Main, where his family, which is of Jewish extraction, is well known. Of his school days there is no special information at hand, but it is evident that he made the most of the systematic training which the gymnasium at Frankfurt provided. He did not go to a University till 1878, when he was about twenty years of age. The German University system, as is well known, encourages students to go about freely from one University to another to attend eminent Professors of their choice as if these all belonged to one University. Oppenheim made full use of this facility. From the beginning he made the study of law his main pursuit. He was first at Göttingen, where he worked at Roman law under Jhering. It is interesting to note that the casuistical method of instruction which this great Romanist practised in such a masterly and entertaining way was applied by Oppenheim at Cambridge to the teaching of international law. At Göttingen, too, he attended some of Lotze's metaphysical lectures. From the end of 1876 to 1880 Oppenheim was at Berlin, which the new German Empire was trying to make the leading German University. There he attended, amongst others, Bruns and Baron on Roman law, Brunner on German Constitutional Law and Legal History, Beseler on German Private Law and von Treitschke on Parliamentary Government.

In 1880 he left Berlin for Heidelberg to hear the lectures of Bluntschli, the great Professor of International Law, who taught there. Later in the same year he went back to Göttingen to take the degree of Doctor Utriusque Juris. His dissertation was on a very special subject of commercial law, "Die Notwendigkeit der Protestirung eines nicht honorirten Wechsels zur Wahrung des Regresses im Fall der Identität des Inhabers und Trassaten oder Domiziliaten" ("The Necessity of Protesting a dishonoured Bill of Exchange in order to preserve recourse in case of the Identity of the Holder and Drawee or Payee at a

certain Place"). He did not afterwards make any special study of this branch of law. His chief object as a student seems to have been to obtain a good general knowledge of law.

But in 1882, after taking his degree, he made a new departure by going through a short course of medical studies at Heidelberg, which he seems to have done, not with any idea of entering the medical profession, but in order to prepare himself for the study of medical jurisprudence. Similarly, with the object of obtaining some acquaintance with legal practice to help him in his studies, we find him during the vacation in the same year acting as Judge's referendar at Neuwied. Having, however, evidently determined to make the study and teaching of law his main work in life, he settled in 1883 and 1884 at Leipzig to prepare himself further for it. His special object there seems to have been to learn the science of criminal law under Binding. This eminent criminologist, whose death has just been recorded, seems to have made a greater impression on Oppenheim than any other Professor. During his stay in Leipzig Oppenheim was in constant communication with him, and till the end of his life he regarded him with gratitude and respect. As a token of this feeling he contributed to Binding's Festgabe his work, *Die Zukunft des Völkerrechts*, to which we shall refer again. From this time till he settled in England Oppenheim made criminal jurisprudence his special pursuit, and Binding greatly regretted his abandonment of it.

During his sojourn at Leipzig he was also strongly drawn to the study of philosophy under the direction of Wundt. The problems of free will and determinism, especially in their connection with criminal responsibility, seem to have been what most interested him. Of his subsequent publications the only one not of a legal character was that entitled *Das Gewissen* (or Conscience). This was published at Basle in 1895. A Dutch translation of it by Van Royen was issued at the Hague in 1899.

In 1885 Oppenheim began his career as a University teacher, becoming a *privatdozent* of the University of Freiburg-im-Breisgau. A *privatdozent* is entirely dependent on the fees of students for his stipend, and these at such a small University as Freiburg could never be large. But Oppenheim, having some

means of his own, was in an independent position, and it was never his object to seek the path of academic preferment. Here he remained seven years, during the last three of which he held the rank of Extraordinary Professor. At a more important University he would have been given more scope for his great ability, but even as it was he succeeded in making a reputation for himself as a criminologist. For it was to criminal law that he now mainly devoted himself, though he lectured occasionally on other branches of public law and jurisprudence, including, I believe, international law. At Freiburg he wrote several little monographs on points of criminal procedure and he made contributions, too, on this subject not unfrequently to legal periodicals.

In 1892 he left Freiburg for Basel, or Basle, where he became at first Extraordinary, and afterwards Ordinary, Professor, though without emolument and without being attached to the public service. The University of Basle, while situated in Switzerland, is organised on German lines. Its social and political surroundings were, however, more congenial to Oppenheim than those of a University in his own country. He was always a Liberal of a moderate type, both in disposition and opinion, to whom Prussian militarism and bureaucracy were peculiarly distasteful. He was called to Basle principally to teach criminal law, and his lectures there on this subject were, we are told, better attended than those of any other teacher of it. His inaugural lecture dealt with the difficult subject of the legal responsibility of medical men for injuries they cause. Its title is, *Das ärztliche Recht zu körperlichen Eingriffen an Kranken und Gesunden.* This was published at Basle in 1892. A fully reasoned legal opinion given by him on a more limited question of the same—*Fahrlässige Behandlung und Fahrlässige Begutachtung von Ohrenkranken*—was eventually published at Wiesbaden in 1899. A more general work on criminal jurisprudence, *Die Objekte des Verbrechens*, showing the influence of his Leipzig teachers, was published in 1894. According to information kindly supplied to me by Professor Binding in a letter written shortly before his death, Oppenheim while at Basle, besides lecturing on criminal law, gave lectures also on the philosophy of law, on general constitu-

tional law and quite regularly on international law. That he lectured on the last-named subject is not confirmed by Professor Wieland of Basle, another of my informants; but the information, coming from one who knew him so intimately as Binding, is, I think, to be accepted.

After remaining three years at Basle, Oppenheim in 1895 made a most important change in his life by giving up his post there and settling in London. He did so to the regret of his colleagues and friends. But the state of his health made some such step necessary. His constitution, which was always very delicate, at this time showed signs of breaking down; he had never been well at Basle and had frequently to journey elsewhere to get a proper amount of sleep. The idea of returning to Germany, however, was not to his liking, though, according to Binding, his professional career in that country was assured. England, which he had been in the habit of visiting almost every year, attracted him not only by the fact that his brother lived in London, but also because its climate and mode of life particularly suited him.

Coming to London he took chambers first in Dover Street and then in the Albany, where he surrounded himself with books. His health improved, and after a few years he married, making with his wife and child a most happy home. In England he still lived exclusively the life of a student as before, but his change of country involved an important change in what he studied. For, being in a country whose system of law was unfamiliar to him, he could no longer with advantage work at criminal law. Hence he took up the study of international law as his occupation, and proceeded to make everything else subservient to it. No man ever pursued the object of mastering a subject with more method or with greater determination. He at once began to form what became a unique library of international law, spending a considerable portion of a not very large income upon it. The fact that the Foreign Office has had not infrequently to borrow books from this collection is some testimony to its usefulness.

But Oppenheim wished to teach as well as to study inter-

national law, though it seemed unlikely that there would be any opening in England for doing so. Very fortunately, however, the London School of Economics and Political Science was able to find him work of the kind he required, and he continued to lecture there till he became Whewell Professor, when he was succeeded by Professor Pearce Higgins, who afterwards also became his successor at Cambridge. With so little encouragement to the teaching of international law as is given in England, the classes at the School have never been large, and generally consist to a considerable extent of foreigners; but Oppenheim did admirable work there as a teacher, for which he is still gratefully remembered. It was his lectures at the School that led him to write his treatise on international law, the most considerable of his writings and the best known. No more complete and systematic account has been written of international law as it existed at the time, nor one based on a wider knowledge of the literature of the subject. It is written entirely from the standpoint that international law is actual law and not a law of nature or of diplomatic usage.

The first volume of the original edition was published in 1905, the second in 1906, about ten years after the arrival of the author in this country. The second edition was brought out in 1912. A third edition is being brought out by Mr. Roxburgh, one of Oppenheim's favourite pupils, who has undertaken the task at great self-sacrifice. The first volume of the new edition should be ready by the end of the year. The book fully established Oppenheim's reputation as an international lawyer. Amongst other judges, Westlake was greatly impressed by its merit. In 1908 Westlake resigned the Whewell Chair which he held, and the question of choosing his successor arose. Oppenheim was not originally a candidate for the post, but on Westlake's insisting on his standing he finally consented to do so and was elected.

This obliged him to reside at Cambridge, for residence had now become for the first time a condition of holding the Chair. The salary of the Professor is small and there is no College fellowship to augment it. Oppenheim could not, in fact, have accepted the post if he had been entirely dependent on it for his living.

A foreigner by birth, though naturalised some time after settling in England, and with conceptions of University life very different from those which prevail in this country, Oppenheim went to Cambridge under great disadvantages. But these by his tact and sociable disposition he to a great extent overcame. He soon made many friends both among his colleagues in the Law Faculty and elsewhere, especially in the Combination Room of Trinity College, where he was welcomed.

Though he was much interested in the general life of the University, he took little or no active part in any public work which was not connected with his own Chair. In fact, he used all his powers and influence in trying to promote the knowledge of his own subject. He was not in sympathy with the Cambridge examination system, which he considered incompatible with teaching or study of a scientific kind, and he avoided as much as possible serving as an examiner, except for the Whewell Scholarships. His lectures were well attended. He took the greatest pains in trying to get students to think for themselves and to learn how to work in a methodical way. Hence he attached great importance to his informal classes, for which he prepared a text-book published by the University Press in 1909 under the title *International Incidents for Discussion in Conversation Classes*, a second edition of which was issued in 1911. Some of the Whewell Scholars were induced by him to make a special study of international law; in fact, some of his pupils contributed to the valuable collection of monographs, written under his direction and edited by him, called *Contributions to International Law and Diplomacy*. It should also be mentioned that the Squire Law Library, especially the international law section of it, was a constant object of his attention, and that he was a liberal donor of books to it. He was far from thinking the position of international law at Cambridge to be in a satisfactory state, but, though he would have been the last to claim exclusive credit for it, much was done during his tenure of the Whewell Chair to raise it. While resident at Cambridge he was in the habit of making occasional visits to London—generally for the day—to give advice at the Foreign Office or other Public Departments on

questions of international law, and he was sometimes consulted in private cases on the subject. At one time he was busily engaged with Colonel J. E. Edmonds in preparing for the War Office a manual entitled *Land Warfare: an Exposition of the Laws and Usages of War on Land for the Guidance of Officers of His Majesty's Army*, which was published in 1912. He also gave valuable evidence about the limits of territorial waters before a Committee of the Board of Trade which was inquiring into the subject of Fisheries; but their Report has never been published. In 1913 he wrote and published a monograph on the Panama Canal conflict between Great Britain and the United States, in which he supported the British contention. A second edition of this was almost immediately called for. In 1914 he edited his predecessor's collected English papers on public international law. He had already written an interesting obituary article on Westlake in the Cambridge Review of 1913.

He was made first an Associate and afterwards a Member of the Institute of International Law, attending its meetings at Madrid and elsewhere, and serving also on some of its committees. Much of his time at Cambridge was taken up in keeping abreast of the growing literature of international law, and in preparing for a new edition of his treatise. He himself contributed largely to this literature, especially in legal periodicals. In his work called, *Die Zukunft des Völkerrechts*, published at Leipzig in 1911, Oppenheim showed how the Family of Nations was gradually developing into an organic society. It may be mentioned that an English translation of this work, edited by Dr. James Brown Scott, is contemplated. In his later writings, *The League of Nations and its Problems*, and *Le caractère Essentiel de la Société des Nations* (his last publication), he was able actually to point out that by the formation of the League a Society of Nations or States had come into existence with distinct legislative, judicial and administrative organs. He saw clearly the difficulties that the League would have to encounter, and did not think that they would be speedily overcome, but at the same time he was by no means pessimistic as to the future.

The outbreak of the war in 1914 made Oppenheim's position

in England a sad and difficult one. Almost anywhere else than at Cambridge it might have caused him annoyance; there his loyalty to his adopted country and to the principles of public law which he had been teaching was recognised on all sides. He had always been an antagonist of German militarism, and he was fully persuaded that nothing but force could teach the military party in Germany the lesson that it required. In the lectures which he delivered during the war to University students and to Belgian refugees he pointed out with the utmost clearness the principles and rules which the Germans had transgressed by their occupation of Belgium and Luxemburg, by their disregard of the laws of war in their treatment of prisoners and non-combatants, in the use they made of poisoned gas and submarines, and in various other ways. He took a leading part during the war in preparing useful manuals for the Foreign Office on subjects of international law, for the information of the British Delegates at the Peace Conference. At the time of his death he was about to take the degree of D. Litt. at Cambridge.

What has been said may be enough to give some idea of what Dr. Oppenheim accomplished, but the man himself was even greater than his work.

THE BRITISH PRIZE COURTS AND THE WAR

By Sir ERLE RICHARDS, K.C.S.I., K.C., Chichele Professor of International Law and Diplomacy in the University of Oxford.

The Prize Courts of any one country cannot make International Law: they can do no more than expound the law for that country: their decisions command obedience only within the territories of the Sovereign from whom they derive their jurisdiction. For International Law is created and developed by the assent of nations as expressed in treaties or established by usage or declared by International Tribunals, and cannot be determined by the courts of any one belligerent. Indeed, the decision of the Prize Courts of the opposing belligerents are certain to differ on some points, if not on many points, although they purport to expound the same law. The international authority of Prize Court decisions depends, therefore, on the extent to which those decisions are accepted or acquiesced in by other nations, for without such acceptance or acquiescence they are little more than the contentions of the State for whom they speak. And this justifies comment which would be impertinent if these judgments were binding among nations.

The laws of war at sea as practised by Great Britain were for the most part formulated and expounded by Lord Stowell in the remarkable series of judgments delivered by him during the Napoleonic wars. In some cases those judgments were reviewed, though seldom reversed, by the Lords Commissioners of Appeal in Prize Cases, and it is a misfortune that reasoned judgments were not delivered in these Appeals, or, if delivered, were not fully reported.[1] But the judgments of the Court of

[1] Acton's *Reports* gives some of these judgments. As to Lord Stowell's judgments, see the *Leucade*, Spinks, 217. "It is most remarkable that scarcely one of his judgments on any question of great importance was ever reversed—not one in a thousand," per Dr. Lushington.

First Instance delivered by Lord Stowell are reported at length if not verbatim, and in them will be found a statement of the principles to which this country has since adhered. There has never been complete agreement on some of the questions with which Lord Stowell had to deal: it is indeed more accurate to say that there has always been a distinct divergence of opinion on some of the points decided by him. But his expositions of International Law have obtained the general assent of at least two other Powers, the United States of America and Japan, and the fact that Great Britain and these two States, each a great Maritime Power, have followed the law as laid down by Lord Stowell, has given to these judgments a commanding, though not a complete, authority.

For a century or more the code of sea law so formulated had proved sufficient for the Prize Courts of this country almost without any new development. The Crimean War raised few questions of novelty: the discussions of the Boer War as to shipments consigned to the neutral port of Delagoa Bay never passed beyond the stage of diplomatic controversy. In the Prize Courts of the Northern States of America the doctrine of continuous voyage adopted by Lord Stowell in regard to enemy Colonial trade had been extended to the carriage of contraband in the Civil War, and the Government of this country had acquiesced. That was a notable development, but it was never the subject of discussion in any British Prize Court.

In the war now happily ended the Prize Courts of the Empire were in a very different position. They were called upon to decide questions of paramount importance to the fortunes of the war arising in novel conditions and calling for the determination of new points. They had to apply the law to warfare which had become essentially changed in character since the Napoleonic wars; much of that change the results of inventions untried before war was declared, and in some cases not known till the war had been in progress for some time. They had to deal with conditions of trade entirely different from those which Lord Stowell had before him. They had to apply the principles of his times to the changes and extension of commerce

necessarily caused by the introduction of steamships, railways, cables and wireless telegraphy; to new methods of commercial finance which had resulted from these easier means of communication; and to an epoch in which almost every article of commerce had become of more or less use for military purposes. They had to face a situation in which every belligerent State was a nation in arms, and the old distinction between combatants and non-combatants had become difficult to maintain, at least in its entirety. To meet the new questions that arose in these ways the Prize Courts have not purported to make new law: they have accepted and preserved the principles laid down by Lord Stowell and have applied them, or perhaps it is more accurate to say developed them, to meet the changed conditions of the time. The rights of belligerents in regard to neutral commerce in war are the result of a compromise between conflicting claims: the one demanding the right to stop all commerce with his enemy: the other asserting the right to carry on his trade with either belligerent unaffected by hostilities to which he is not a party. But this compromise rests on certain admitted principles: and the question in every case must be whether a captor has a right to the condemnation of the captured cargo within those principles. It is by this test that Prize Courts have determined claims. It is the purpose of the present article to call attention to some of the chief developments of these principles which have been adopted by British Prize Courts during the late war.

At the outset the Privy Council, the final Court of Appeal in Prize Cases, made a remarkable pronouncement as to the position of Prize Courts in their relation to the Executive. They declared in no uncertain terms that Prize Courts were independent of instructions from the Executive.[1] In theory Prize Courts are International Tribunals in the sense that they administer the law of nations; they ought not, therefore, to be influenced by any instructions from the Sovereign, or from the Executive who carry on the Government of the country in his name, in so far as those instructions are inconsistent with Inter-

[1] The *Zamora*, L.R. 1916, 2 A.C. 77.

national Law. But this position has never before been insisted on by any Prize Court in any country. Lord Stowell faced the question but gave no opinion on it which can be called definite. The German Prize Court frankly admit that they have to obey the orders of their Sovereign, and that International Law is nothing to them if inconsistent with those orders. The British Prize Court has now definitely assumed a higher status. It is bound, of course, by Statute, for a British Statute binds every British Prize Court as it binds every other British Court; but instructions to Prize Courts have, in general, been given by means of Orders in Council, and these have not the effect of Statutes; and there is an essential difference between Orders made in Council on the mere advice of the Executive and Statutes passed by the legislative body with the knowledge of the public and with opportunity for discussion and objection. It is now declared to be the law that Orders in Council do not bind British Prize Courts if inconsistent with International Law, and by this decision the Prize Courts of this country have assumed the status which they must have if they are to maintain successfully the position that they administer International Law. And we may hope that the Prize Courts of other countries will in time follow this precedent and assume the same attitude of independence. It is to be regretted that the Prize Courts of this country have not as yet accepted the full results of this international position, inasmuch as they do not allow enemy subjects to appear before them in every case. Clearly, if they are to be Courts to decide cases in which enemy subjects are concerned according to the Law of Nations, those subjects ought to be entitled as of right to appear and defend their interests. But the practice has been to the contrary in the past. In the present war the Prize Court has allowed enemy subjects to appear to claim specific protection granted by treaty, but not to appear in other cases.[1] There can be little reason for the maintenance of this restriction. If alien enemies can appear to claim the benefit of exemption conferred on them by the Hague Convention, then surely they should be allowed to appear

[1] The *Möwe*, L.R. 1915, p. 1.

to claim exemption conferred on them by the common law of nations. The broad question does not seem to have been argued directly, but the Courts have proceeded on the assumption that the right of audience was limited in the manner described. German Prize Courts take a more liberal view and allow enemy subjects to appear before them; and this, as is thought, is the only view consistent with the international status of Prize Courts.

Apart from such questions as these, our Prize Courts during the late war have been mainly concerned with claims against cargoes consigned to neutral ports. By the fortune of war and by the efficiency of her fleet Great Britain secured the command of the Channel and of the North Sea from the commencement. Direct trade by those routes became impossible: no German merchant ships could keep the sea for any time, and neutrals soon ceased to ply to German or Austrian ports. The great trans-Atlantic trade of the Central Powers, therefore, if it was to be carried on at all, had to be shipped to neutral ports and thence forwarded by land or sea to the ultimate destination. Sometimes the goods were sold directly to the enemy: more often the sale was an independent sale to a merchant in a neutral country who resold to buyers in the territory of the Central Powers. And the broad question that lies at the root of these Prize cases is the extent to which belligerents are entitled to interfere with cargoes consigned in the first instance to neutral ports. We are not at this point concerned with the rights against neutral commerce claimed and enforced by the Courts under the Orders in Council which are known in this country as the Retaliatory Orders; those were exceptional powers which must depend for their justification on the exceptional circumstances in which they were asserted, and to them reference is made at a later stage. It is to the general right to interfere with neutral trade that we here refer, and this depends on the common law of nations, varied or enforced, according to the view that is taken of earlier history, by the Declaration of Paris.

International Law has never yet conferred on belligerents a power of stopping all trade with their enemies. Neutrals have always so far been able to resist that claim as an undue inter-

ference with their own commerce: though the experiences of the late war and of the Napoleonic wars suggest that belligerents will in fact go nearer and nearer to the exercise of such a power in proportion as neutral opinion becomes more and more negligible. But the law has given to belligerents the right to stop neutral trade in two important respects, blockade and contraband. They may stop trade of all kinds going to a specific port or coast declared to be under blockade: they may stop trade of particular kinds going to the enemy country generally or to the enemy forces. But with blockade the Prize Courts in this war have had little, if anything, to do. The old forms of blockade, discussed on so many occasions and in so many books, have ceased to be of importance: for modern developments of warfare render it unsafe for a blockading squadron to remain for any length of time in a specified and limited area: and whatever extension may be authorised in regard to the exercise of the right of blockade of an enemy port or coast, there is nothing in the existing law which could authorise the blockade of neutral coasts. That would not be a development, but an alteration on a vital point of the principles of the law of blockade. The British cruisers operating in line from Scotland to the North cannot justify their captures, at least in the writer's opinion, by any reliance on the principles of blockade. It follows that British captures, apart from those made by way of retaliation, have for the most part raised questions dependent on the law of contraband.

In regard to contraband we find marked developments of principles during the late war, and we find this in regard to each of the two elements essential to the condemnation of neutral cargoes, to wit, character and destination.

In the first place there has been a great enlargement of the list of contraband goods, an enlargement rendered necessary by the fact that year by year, and in time of war almost month by month, there has been an increase in the number of articles of commerce required for military purposes. The framers of the Declaration of London attempted to make a permanent division between (i) articles exclusively used for war;

(ii) articles susceptible of use in war; and (iii) articles which could never be declared contraband. But experience has shown that any such division is hopelessly impracticable. Indeed, the war had not been long in progress before we saw articles declared to be absolute contraband which according to the agreement of 1909 were never to be contraband at all. This enlargement of the contraband lists is a development of importance. It increases proportionately the powers of belligerents over neutral commerce. It is effected in the first instance by the declaration of the belligerent Sovereign, but since Prize Courts would refuse to condemn articles declared to be contraband contrary to International Law, it must be assumed that they have assented at least to those items in the lists which happen to have been enforced by their judgments.

The number of articles with which Lord Stowell had to deal seem curiously limited compared with those declared to be contraband in the present war. For instance, in the Treaty between Russia and Great Britain of 1801, the list of absolute contraband consists of: "canons, mortiers, armes à feu, pistolets, bombes, grenades, boulets, balles, fusils, pierres à feu, mèches, poudre, salpêtre, souffre, cuirasses, piques, epées, ceinturons, gibernes, selles et brides." A few years later, in the Treaty of 1806 between Great Britain and the United States, the definition is as follows: "In order to regulate what is in future to be esteemed contraband of war, it is agreed that under the said denomination shall be comprised all arms and implements serving for the purposes of war by land or by sea, such as cannon, muskets, mortars, petards, bombs, grenades, carcasses, saucisses, carriages for cannon, musket rests, bandoliers, gunpowder, match, saltpetre, ball, pikes, swords, headpieces, cuirasses, halberts, lances, javelins, horse furniture, holsters, belts, and generally all other implements of war; as also timber for shipbuilding, copper in sheets, sailcloth, hemp and cordage, and in general (with the exception of unwrought iron and fir planks, and also with the exception of tar and pitch, when not going to a port of naval equipment, in which case they shall be entitled to pre-emption), whatever may serve directly to the equipment of vessels."

Contrast these with contraband as proclaimed in the late war. The list of absolute contraband enumerated in the Proclamation of July 2, 1917, comprises 183 articles, and in addition to obvious implements of war such as those specified in the treaties mentioned above, includes all kinds and conditions of materials which play a part in peaceful commerce. Acetic acid, albumen, alcohols, aniline, arsenical ore, asbestos, bamboo, bitumen, bleaching powder, bones, bromine, celluloid, cotton, coupons, credit notes, diamonds, flax, goldbeaters' skin, hæmatite iron ore, hair, lubricants, mercury, mineral oils, negotiable instruments, phenol, photographic films, rattans, rubber, silk, soap, starch, tin, waxes and wool, are items, taken at random from this long schedule, sufficient to indicate the scope and variety of contraband articles at the present time. In addition there are a considerable number of articles proclaimed to be conditional contraband.

There can be no doubt that these enlargements of the lists are covered by the principle on which neutral trade is subject to condemnation. The articles included in them are wanted for the prosecution of hostilities, and belligerents cannot be denied the right to stop them even though the inroad on neutral trade becomes the greater by each enlargement of the list. Here we have a development of existing principle which has greatly increased the powers of belligerents and has correspondingly decreased the immunity of neutral trade.

In the second place there has been a development in regard to conditional contraband which has had the effect of still further lessening the protection of neutral trade under the law as practised in this country before this war. Up to that time cargoes of conditional contraband—that is, of commodities which from their nature were as likely to be intended for commercial uses as for military purposes—were only subject to condemnation if it could be proved that they were going to the forces of the enemy or to some arsenal or other place of military equipment; and at the time of the Declaration of London there had been prolonged discussion as to the exact definition of the destination from which a military user should be preserved. But the distinction resting

on this particular destination began to dwindle as soon as hostilities commenced, and finally ceased to exist. The ports of belligerent countries were held, and practically without exception, to be bases from which military forces drew their supplies, and that by the Prize Courts both of Great Britain and of Germany; and with those decisions the special protection of conditional contraband disappeared altogether so far as an island belligerent was concerned, and was much lessened in the case of a continental Power. Moreover, the stress of war forced all the able-bodied subjects of all the belligerents to take some part in military work; if not by active service, then by work in manufactures or in public service in some other way. Nations were in arms, and it became impracticable to preserve the distinction between supplies for combatants and those for non-combatants. And as soon as the imports of food-stuffs and other goods in the lists of conditional contraband into belligerent countries became difficult, the Governments of those countries took powers to control and requisition all imports: so that in fact imports were going to the Governments, and for that reason, if for no other, ceased to be conditional contraband. These developments made it impossible to maintain the distinction on which the protection of conditional contraband had rested, and the difference between the two classes of contraband soon ceased to be of general importance in the Prize Courts of either belligerent. If the destination of a cargo were once established in the British Prize Court to be Germany, there was no use in contending, at least in the later period of the war, that the special destination to German forces or to a German base had not been established; if it was going to a German port the answer was that every German port was a base of supplies; if it was going to Germany by land, that the German Government had requisitioned every cargo as soon as it reached German territory. And the German Prize Courts acted on a similar assumption.[1]

[1] On April 13, 1916, the British F.O. published a list of contraband articles in which no distinction was made between absolute and conditional contraband for the reasons stated above; but this list was issued only for the information of the public; in the formal Proclamation of contraband the distinction between the two lists seems to have been preserved without exception.

The fact is that the progress of events has made the distinction between the two classes of contraband no longer tenable; nor does it seem probable that the distinction can again be revived. And if this be so the advance is noticeable : for it brings belligerents much nearer to the position they have always desired to attain, but have never yet reached in law. They have always desired, as has been said, to establish the right to stop all commerce going to the enemy. If the enlargement of the lists of contraband can be maintained and the special protection hitherto given to conditional contraband is at an end for all practical purposes—and both these assumptions seem to be the necessary consequences of modern warfare—then the trade of neutrals which is exempt from seizure will be, or at least can be, reduced to a negligible quantity. By the first Retaliatory Order in Council of March 1915, Great Britain asserted special powers as against commerce going to or coming from Germany. So far as commerce going to Germany was concerned she could have obtained her object by extensions such as these in regard to contraband without incurring the odium which special measures invariably provoke. The Retaliatory Orders did prohibit German exports which no extension of contraband could do, but the extent of that advantage is open to question.

Thirdly, as to destination. In the case of both classes of contraband it is, of course, necessary to prove an enemy destination, and on this point there has been a further and most important development both in regard to what is known as continuous voyage and as to the manner of proof of destination. It has been already observed that direct shipments to enemy ports from North or South America ceased at an early stage of the war, and that from that time all cargoes for Germany were consigned to neutral ports, Scandinavian or Dutch. The late Sir S. Evans had to deal in the first year of the war with a large consignment of food-stuffs, " pig products " as they were called, going from shippers in the United States to Swedish ports; and this raised the question whether the principle of continuous voyage adopted in the American Civil War was a principle of International Law. And after a careful review of the authorities he decided, in one

of the most striking of the judgments with which he has enriched the Prize Reports,[1] that the ultimate destination of the goods can be investigated whatever their first port of discharge, and that goods within the lists of contraband are subject to seizure on the high seas at any stage of the journey if their ultimate destination warrants condemnation. This was the first decision on the point in a British Prize Court, but it is thought that it will be generally accepted as giving effect to consequences which follow from the admitted principles of International Law. It could not be challenged at the time by the greatest neutral, the United States of America, for they had themselves claimed the same right in their Civil Wars, as has been already observed, and no other neutral seems to have pressed any objection of principle. Indeed, it would be difficult to combat the reasoning of the learned President; for the principle of law is that a belligerent has the right to stop contraband going to his enemy, and if this be so it can make no difference whether the carriage of the contraband is by one vessel or by two, or whether the contraband is discharged at a neutral port and carried thence to its ultimate destination by land. A belligerent can, of course, only seize contraband when it is on the high seas, for on land or within territorial waters it is within the sovereignty of a neutral State and he can have no rights there. The question of ultimate destination has become confused by the adoption of the term "continuous voyage," which suggests a fictitious prolongation of the voyage of the ship, on which the contraband was originally consigned, beyond the port of her discharge. No such fiction is necessary, for the real test is the ultimate destination of the goods; and it matters not by what route the goods travel or whether the ship which carries them for the first part of their journey ends her particular task at a neutral port or elsewhere. If they are seized at sea they must be subject to condemnation. There has never been a war in which enemy trade has been attempted to be carried on so entirely and in such large volume through neutral ports; and the success of the Allies in hampering and eventually, as one may almost say, in stopping that trade,

[1] The *Kim*, L.R. 1915, p. 215.

was a potent factor in their success. It is satisfactory, therefore, to find that the Allies had the power of doing this according to the existing principles of International Law. By the Declaration of London it was provided that conditional contraband consigned to neutral ports should be free from capture; and if the Declaration had been binding on Great Britain in this war, Germany could have carried on her trade in any articles not on the list of absolute contraband, such as food-stuffs, with impunity. If that had been the case the war might not yet be ended, or might have ended differently. The distinction between the two classes of contraband would, in that case, have proved of first importance. But, fortunately for the Allies, the Declaration had never been accepted by this country.

Apart from this substantive development of the law of contraband, there have been changes in the practice of our Prize Courts in regard to admission of evidence of destination which have had a far-reaching effect. In former wars condemnation was decreed on ships' papers and standing interrogatories, or, as Sir J. Marriott has put it, ships could only be condemned, according to the practice of nations, "out of their own mouth." Captors were not allowed to adduce extrinsic evidence, except under circumstances of suspicion arising on the primary evidence or in exceptional cases.[1] "The evidence to acquit or condemn, with or without costs and damages, must in the first instance come merely from the ship taken, viz. the papers on board and the examination on oath of the Master and other principal officers, and for which purpose there are officers of Administration in all considerable seaports of every maritime Power at war to examine the Captains and other principal officers of every ship brought in as prize upon general and impartial interrogatories. If there do not appear from thence ground to condemn as enemy's property or contraband goods going to the enemy, there must be an acquittal; unless from the aforesaid evidence the property shall appear so doubtful, that it is reasonable to go into the further proof thereof." [2] But by the British Prize

[1] The *Haabet*, 6 C. Rob. 54. The *Aline* and *Fanny*, 10 Moore, P.C. 491.
[2] Report of 1753.

Court Rules brought into force by an Order in Council of August 5, 1914, this was changed, and the evidence of the captors may now be given in the first instance. This is a radical change, for it gives to the captors the privilege of opening the case and of supporting it by any extrinsic evidence. Under these new Rules there is no longer a first hearing on the evidence derived from the ship, and the Prize Court is no longer precluded from receiving extrinsic evidence for which a suggestion has not been laid in the preparatory evidence. The result is that innocent vessels or cargoes are now seized on mere suspicion while efforts are being made to obtain evidence from extraneous sources to justify the detention and the commencement of prize proceedings." [1] Apart from this power of detention on suspicion, the Prize Courts have construed these Rules widely on the hearing: evidence has been admitted as a matter of course which would have been shut out according to the law which governs proceedings in municipal Courts, with the result that the claimant in a Prize Court has suffered the further disadvantage of being placed in a less favourable position in regard to evidence produced against him than a litigant in any other Court. This on the face of it appears to be a hardship, and not the less so because claimants are commonly resident in a foreign country and their opportunities of communication with their legal advisers in the territory in which the Prize Court sits are both difficult and infrequent, at least to judge by the experience of this war. It is idle, of course, to expect that neutral claimants should attend before any belligerent Prize Court in which a claim is to be heard in which they are interested, for that would be unreasonable and in many cases impracticable. These changes of procedure may in some cases or in some Courts work injustice, and there is weight in the neutral complaints against detention on suspicion, but on the whole they seem to the present writer to be an improvement on the old system because they enable the real facts to be brought out. There is no reason why the dice should be loaded in favour of claimants by the restriction of evidence in the first instance to the ships' papers and the standing interrogatories. Nor is it

[1] U.S. Note to Great Britain, October 21, 1915.

possible to insist on the best evidence alone being given on every point because the presence of witnesses or the production of original documents cannot be always procured in the country of trial. The answer to the complaint of possible hardship to absent claimants is that it must be left to the presiding judge to see that no injustice is caused to them, and that experience has shown that this safeguard can be made effective. And on this point it must be remembered that Lord Stowell was not called on to decide the difficult questions of fact which arise on the question of continuous voyage, except in a few cases and to a limited extent. These questions must be determined by extrinsic evidence and not by ships' papers. As to detention on suspicion, it is reasonable to allow some delay for inquiries, but if the detention be prolonged beyond that time the Court ought to give compensation, and it is thought that Prize Courts ought to be more generous in this respect than they have been in the past. In this war compensation has but seldom been awarded. It has been refused in most cases in supposed compliance with rulings of Lord Stowell. But it is to be remembered that the limitations laid down by that judge applied to a very different practice, and that he never could have had in his mind the case of neutral vessels detained in order that the captors might have time to make out a case against ship or cargo, rather than on any definite ground of suspicion existing at the time of capture.

This alteration in the method of proof has enabled captors to establish the ultimate destination of goods in cases in which it would have been hopeless to attempt to do so under the old practice. It has been said that the great bulk of contraband going to Germany in this war has been consigned in the first instance to neutral ports. The ships' papers never, of course, reveal that destination; they show no more than a destination to a neutral port; nor would the standing interrogatories administered to the master or crew reveal any facts material on this issue. But captors with this new liberty of proof have been able to establish the enemy destination by other evidence. And since this class of case has been frequently before the Court, it may be useful to illustrate the kind of proof that has been usual.

Neutral consignees to whom cargoes of contraband for Germany have been consigned have been either individuals or firms in neutral ports who have played the part of mere agents for the consignors or, in other words, as they have been called in the Prize Court, "dummy consignees," mere conduit pipes through which the consignments were to reach the enemy; or they have been merchants carrying on a bona fide trade in neutral ports who have bought the goods out and out for their own business with the intention of reselling them in German markets. Now the evidence which has been produced to prove the enemy destination in these cases is of various kinds. In the first place it has consisted of cablegrams, messages by wireless telegraphy and letters. Great Britain during this war has been in the singular and exceptional position of being able to control the cables which carried messages to North and South America, she has been able to tap a large number of wireless communications which have passed from Germany to the United States, and she has obtained copies of a great number of letters passing between German merchants and traders in America. These communications were collected, sorted and arranged with infinite care and industry by a special department of the Government appointed for that purpose, so that in the later years of the war, at any rate, there was in existence a dossier more or less complete of all the principal merchants concerned in trade with Germany. Their code words were discovered, their dealings were tabulated, and it became possible in this way either to show the enemy destination of the particular consignment seized or to infer from the transactions of the consignees during the war, even if the evidence in any particular case were not directly to the point, that captured cargoes consigned as a result of these communications were going to the enemy; an inference which consignees must displace to avoid condemnation.

But in the cases where this mode of proof was not possible, other evidence was admitted to shift the onus on to the claimants of showing that the ultimate destination of the goods was neutral. It has been said that some of these consignees were persons not engaged in trade in the ordinary way but taking part in large

transactions in unusual circumstances. For instance, in one case a lawyer, holding a small position in Sweden with a salary of £200 a year and having had no previous experience in trade, with no apparent financial resources of any kind, was found suddenly to have purchased a cargo of lubricating oil for which he paid a sum of £40,000, and to have chartered a ship to carry the oil, for which he paid in cash down the sum of £16,500.[1] In such a case as this the Court has put upon the consignee the onus of showing that his purchase was a genuine one and that he was bona fide commencing a trade in his own country, an onus which could not be discharged in the case to which reference has been made. Or in the less simple case of consignees carrying on trade in the articles consigned, it could be shown that in other cases they had acted as intermediaries for German buyers, and the onus of negativing enemy destination was similarly put upon them.

And in regard to consignees carrying on a bona fide business in a neutral country—that is, an independent trade with no proof of German agency—the onus has also been shifted in some circumstances. In their cases it had to be admitted that they were carrying on a genuine neutral trade, that they were engaged in that trade before the war and that they continued it during the war; that consequently they had a genuine neutral trade which necessitated some imports of the kind in question. But inferences of an intention to send on the consignments to the enemy were drawn against them if any marked increase of their imports of commodities on the contraband lists could be shown since the commencement of war, or if the imports into the neutral country in which they carried on business had already been sufficient to satisfy the normal demands for consumption there. These facts, if established, were held to shift the onus on to the claimaints of proving that any particular cargo was to be used for neutral consumption. For instance, a merchant was engaged before the war in importing coffee into Sweden and selling it there, and the figures of that pre-war business are evidenced by the official returns of Swedish trade. It is proved that during the war the merchant's imports have increased fourfold. The consumption in Sweden can-

[1] The *Hillerod*, 1918, App. Cas. 412.

not have appreciably increased, there is great demand for coffee at high prices in the neighbouring country of Germany. The onus is therefore shifted on to the merchant to show that the particular cargo is not going to Germany. Again, a similar inference may be drawn from the general trade statistics of the country in which the claimant trades. Take the case of cocoa beans. Prior to the war Germany was importing annually about 55,000 tons of cocoa beans, but the outbreak of war cut off nearly 85 per cent. of her supply, and the price of cocoa in Berlin rose till it was nearly eight or nine times its price in London. Prior to the war the import of cocoa beans into Sweden was between 1600 and 1700 tons only annually, and there was no export trade to Germany. Since the outbreak of war imports of cocoa beans into Sweden increased tenfold to 16,000 and 17,000 tons, and a re-export trade to Germany developed. In fact, during the first year of the war such re-export amounted to over 1200 tons, and in addition there was a further re-export in the manufactured cocoa.[1] It is at once apparent from these figures that a large amount, if not the greater amount, of cocoa imported into Sweden beyond the amount normally required for Swedish consumption must have found an ultimate destination in Germany. In this class of case, therefore, the Court would draw an inference of probabilities and call upon the consignees to show that they proposed to dispose of the goods in a neutral country. In either case the claimants could displace the inference by proving re-sales to retailers in a neutral country before capture, or by proving in any other way that the quantity in dispute was necessary for and was allocated to his internal business.

The effect of this extension of proof has been enhanced by the power which the Court has exercised of ordering inspection of claimants' accounts. As to the inspection of accounts relating to the particular transaction in dispute, there can be little question that merchants must produce accounts, or if they do not they will hardly be able to establish their claim. For merchants' books are the best evidence of the details of any transaction :

[1] The *Baron Stjernblad*, 1918, A.C. 173.

they will show an independent purchase if independent purchase there be, and if there have been re-sales for neutral consumption, will show to whom the goods have been re-sold and so prove an innocent destination. But the Prize Courts have gone a step further than this in some cases, and have ordered a general discovery of all books of accounts and other documents from a date before war began (January 1, 1914), up to the date of seizure, showing dealings in goods of the same kind as those seized for delivery in Germany. In other words, captors are given the right of examining all the commercial books of a claimant relating to goods of the same kind or bought from the same shipper as those in dispute for the whole period of war up to the date of seizure.[1] This has been regarded as oppressive by neutral merchants, and it seems probable that merchants of this country will take the same view of so wide an order if they should be in the same position as neutrals at any future time. It is, of course, an order which enables a belligerent to obtain particulars about the general trade of the merchants which can be made use of on other occasions, and it is not unnatural that objection should be taken to it. The Swedish Government passed legislation to prevent Swedish subjects from giving this information, amongst other things, but no such legislation can be effective, for no Prize Court will regard such a law as an excuse for non-compliance of its order. This matter seems likely to come up for reconsideration at some future International Conference.

No one of these alterations of practice may seem of itself of first importance, but the combined effect of them was to check neutral trade in contraband to a marked extent. The question of the ultimate destination of any cargo is a question of fact, and these modes of proof of that fact do not appear to go beyond the limits of fairness, subject, perhaps, to the point as to discovery that has been submitted above. It would be idle for a Court to shut its eyes to the increase in imports either by any particular merchants or into any particular neutral country, when it is apparent that the increased importation can only be accounted for by enemy consumption. Nor is it an unfair way of treating

[1] The *Consul Corfitzon*, 1917, A.C. 550.

the inference of hostile destination which arises from such figures to say that it is a presumption which can be rebutted by the claimants' own evidence in any particular case.

To sum up, it is thought that these decisions and practice as to contraband are no more than developments of principles of law which have been accepted at least by the great maritime nations.

But on another and a different point the Prize Courts have gone further and have supported the claim of belligerents to a legal right against neutral trade which has not hitherto been generally recognised outside this country as within accepted principles, though in taking this course it is claimed that they have done no more than follow principles already binding in this country. Decisions of British Prize Courts in this war have established the right of one belligerent to disregard the limits of International Law and to retaliate against neutral commerce, if the other belligerent has infringed neutral rights of trade to the detriment of the first belligerent: and the Courts have given effect to that right by their decrees.[1] In fact, British Courts were bound so to hold, since it was found that the highest tribunal in Prize in this country had settled the point in the Napoleonic wars. But that discovery was made only at a late stage: the decisions of the Lords of Appeal were brought to light during the argument of cases in the present war, and it seems never to have occurred to any of the writers on International Law whose business it is to examine the practice of nations that retaliation against neutrals had been finally accepted as a legal right by the highest judicial authority in Great Britain. It was known that Lord Stowell had upheld the Retaliatory Orders in the Napoleonic wars and that Napoleon had claimed the right to retaliate in his Decrees. But for some reason or other both the British Orders in Council and the French Decrees were treated by jurists as turning on the right of blockade. Moreover, the United States had gone to war in 1812 because of the British claim to enforce these orders, amongst other causes. That nation had therefore declined at that time to admit the

[1] The *Stigstad*, L.R. 1919, A.C. 219. The *Leonora*, L.R. 1919, A.C. 974.

validity of retaliation, and that in the most emphatic way. The right claimed is obviously one of extreme importance, for it enables belligerents to override the whole of the protection which the common law of nations and treaties have given to neutral trade, and yet if retaliation be a legal right, neutrals can have no cause of complaint. The effect is far-reaching, for though a limitation has been declared to exist for the protection of neutrals (retaliation is not to inflict on neutrals where not looked at as a whole inconvenience greater than is reasonable under all the circumstances),[1] it seems little likely that the Prize Court of any belligerent can give practical effect to any such limitation, because Courts are bound by the recitals in the Order which imposes retaliatory measures, and those recitals are certain to allege a case sufficient to justify any action they enjoin. It is remarkable that of this overriding power there is no suggestion in the writings of any jurist, and no reference made to it in the great codes of sea law—the Declaration of Paris, or the Convention of the Hague, or in the unratified Declaration of London—indeed, it is hardly possible to conceive that the existence of such a right was present to the minds of the statesmen and jurists who framed those treaties or discussed that draft Code of the laws of war at sea.

In most cases it is not useful for those who have been concerned in the conduct of litigation to offer subsequent criticism on the judgment that has been pronounced; but the topic is of such importance and is so certain to provoke further discussion before retaliation of this wide extent is admitted into the general body of International Law, that it may be permitted to present some observations upon it on the one side and on the other; and not so much upon the particular judgments to which reference has been made as upon the general aspects of the matter. In brief, the conclusion submitted is that though the law must be reluctant to admit the proposition that illegality may be answered by illegality at the expense of third parties, yet that in practice it is impossible to deny that some right of retaliation must be allowed, and that the real questions to be settled by

[1] The *Zamora*, L.R. 1916, A.C. 77, at 98.

Convention are the occasions on which the right may be exercised and the limitations which ought to be imposed on the exercise of it. The right is only likely to be claimed in exceptional circumstances, for in normal wars—that is, in wars in which two or three nations only are concerned—the apprehension of neutral action will be so effective that no belligerent will be likely to infringe the rights of neutral trade; nor, if he does, is his opponent likely to push a right of retaliation to any extreme length. It is only in super-wars such as the last, in which neutral influence ceases to be a real power, that belligerents will find it to their ultimate advantage to disregard neutral interests.

And now as to the arguments for and against the existence of such a right. It is said on the one side that it is not within the power of any one or more States to alter the law as against a Third State without their assent, nor of any one party to a treaty securing neutral rights in time of war to alter that treaty by his own action. The point on treaty rights presents the most simple example, and among treaties let us take as an instance the Declaration of Paris. No one belligerent can set aside, it is said, the protection conferred on neutral trade by that treaty: nor can belligerents generally do so, and yet that is what a right of retaliation may result in effecting. And there is the further and separate objection that if retaliation be allowed, neutrals can have no certain means of determining in whom the legal right of retaliation is vested. In some simple cases the blame for the first breach of International Law may perhaps be fixed beyond controversy on the first offender, and the neutral can take any action within his power against that offender. But in more complicated instances that cannot easily be done, if it can be done at all. It is necessary, before the action of either of two belligerents can be successfully challenged, that the blame of the first offence shall be established as against one of them, and the difficult, if not impossible, onus will be placed on the neutral of deciding on whom this blame is to be cast. Every belligerent in the proclamation in which he announces his intention to disregard the limitations of International Law will begin by a recital of the breaches of law committed by his

opponent which justify his action. The preamble to the Berlin and Milan Decrees and the British Orders in Council of that time are precedents: the German Proclamations and the British Orders in Council in the late war follow on the same lines. The neutral has no complaint against any but the original offender, for the other Power, as is assumed, has a right to retaliate, conferred by law. Against which belligerent is he to complain? The Prize Court of each belligerent will tell the neutral that he ought to have taken action against the other belligerent, and that the case is too clear for argument; indeed, no argument will be permitted, for Prize Courts generally hold themselves bound by recitals in the Orders or other documents which prescribe retaliation. The neutral can get no remedy, therefore, by legal objections in those Courts. The result that a neutral claimant cannot dispute the fact from which alone the right to seize his property springs into existence is not one which the law can view with satisfaction. These are objections to putting retaliation as high as a legal right, which are of force.

The real argument on the other side is practical rather than legal. It is that no belligerent can be compelled to fight at a disadvantage, and that if one belligerent disregards the restrictions of the law for his own ends it must be open to the other belligerent to claim the same freedom. The remedy, it is said, is for neutrals to insist on the observance of the law by their own action. This, it must be allowed, is a harsh result, because small nations cannot give effect to protests as against powerful wrongdoers; but then, as is said, in normal wars the general body of neutral opinion and the fear of converting those neutrals into enemies will be sufficient to prevent any infringement. The experience of our two great wars has shown that, whatever the legal objection, belligerents will retaliate when they can afford to disregard the check of neutral opinion; and no rule of law will prevent them from so doing under supreme stress. And if that be so, it is better, as is said, that Prize Courts should give a legal title to captures, rather than that the property in them should remain a matter of interminable dispute.

It is thought that this summary represents fairly enough the

main contentions on either side. The whole matter is certain to be the subject of discussion at any future conference at which the laws of war at sea are under revision; and the right of retaliation will have behind it the usage of England and of France in their wars a century ago, and of Great Britain and Germany (and to some extent of France) in the late war: against it the action of the United States in 1812. It looks as if there would be a difference of opinion on the point between practical and academic opinion; the former convinced that in certain circumstances such a right will be claimed and will be put in force whatever convention may declare: the latter objecting to giving any recognition to a claim to weaken the protection which International Law has more and more been giving in recent years to neutrals and to neutral rights. There are great practical difficulties, as has been observed, in holding that there is no right at all to retaliate, and it may be the better course to seek to regulate and control the exercise of it. If the right is to be recognised there is likely to be an insistent demand that the exercise of it should be subject to the ultimate decision of an International Court, for the Prize Courts of belligerents do not hold themselves free to question the recitals of an Order imposing retaliation. But there are great objections to an International Prize Court, and it is not possible even to constitute such a Court until some Code of the laws of war at sea is framed and agreed to, because there are such differences at present in the views held on various points of that law, that to set up a Court to declare the law would be in effect to give legislative powers to the members of the Tribunal. A possible solution might be an International Commission to inquire into the occasion of the exercise of the right of retaliation similar to those Commissions which have on frequent occasions examined into the decrees pronounced by Prize Courts with regard to captures generally. It seems not impossible, too, that some agreement may be come to as to the penalty to be imposed by Retaliatory Orders. At present the limit of retaliation is really found only in the action of the opposing belligerents, for though that may not be always stated in so many words, it will be found to be the limit which

really underlies discussion. It has been frankly argued in this war that if one belligerent scatters mines on a trade route in order to impede the commerce of his enemy, although he knows that by doing so he will almost certainly blow up and destroy neutral traders on the high seas, it then becomes the right of the other belligerent to scatter mines in his turn, at the risk of destroying neutral ships in the same way. This is an extreme way of stating the case, but however that case may be put, it is believed that the discussions will always come back to an examination of the enemy action. A right to sequestrate neutral vessels or neutral cargoes may be thought to be the highest penalty that any belligerent should be allowed to impose or any Court to decree : for sequestration puts the neutral ship or the neutral cargo out of action for the rest of the war, and that should be sanction enough; or, at least, it may be thought to go as far as is fair. If any belligerent went further than that, the neutral would have a right to compensation at the termination of hostilities.

These are some of the chief points which emerge from the decisions of British Prize Courts in this war. But they are not the only points. There is hardly any topic of the laws of war at sea which has not come, at one time or another, within the purview of the Courts. And if it be permitted to express any opinion on the whole body of judgments, it is that they form an exposition of Prize Law which, for learning and lucidity, will repay the closest study and may well challenge comparison even with those expositions of International Law which have made the fame of Lord Stowell.

SOVEREIGNTY AND THE LEAGUE OF NATIONS

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From the days of Bodin the nature of sovereignty in the modern state has been a matter of discussion. Such discussion has generally been conducted in an atmosphere of party strife, sometimes in an atmosphere of civil war. In its most recent form it has concerned itself with the effect upon national sovereignty of certain suggested international remedies for international problems, which the late war and the recent peace have emphasised.

For some years before the war it had become apparent that Englishmen were no longer content with a definition of sovereignty which shared with various other nineteenth-century conceptions a simplicity the usefulness of which had been exhausted. The Austinian conception of sovereignty [1] was essentially a product of its generation. Its simplicity may have impoverished the political thought of contemporaries, but, to give it its due, it had enriched their political life with a working hypothesis whose value was freely tested in the process of adapting an historic constitution to the needs of the new political and industrial England, which had been created by the passing of the Reform Bill into law.

When that task had been accomplished the very simplicity of the conception was seen to have its disadvantages, and a new school arose. Every one is familiar with the famous essay of Lord Bryce,[2] in which there is clearly brought out the distinction between sovereignty *de iure* and *de facto*, between "the

[1] Austin's *Jurisprudence*, especially Lectures I and VI.

[2] *Studies in History and Jurisprudence*, Vol. II. Essay X.

person or body, to whose directions, executive or legislative, the laws attribute legal force," and "the person or body, which can make his or its will prevail with or against the law." The point is helpfully and rightly made but it hardly gets one further. To a student of modern politics it will appear that in modern England, and this is true to some extent of other countries, the actual sovereign is, given time, almost certain to become the legal. This it may do through a process of constitutional reform, or, failing such reform, by revolution. The development of English history is a constant illustration of this truth; and Magna Carta, the summoning of parliament, the Restoration and the Revolution settlements, the various Reform Bills may be best described not so much as steps in a teleological development, but rather as phenomena indicating that once more political was adjusting itself to coincide with actual power.

In more recent times criticism of this and the Austinian conception of sovereignty has proceeded from a further quarter. The monumental work of Gierke, introduced to English readers by the late Professor Maitland, has not lacked popular expositors. It has been utilised in ecclesiastical polemics [1] and, in the hands of an Oxford scholar of promise, who has familiarised himself also with the views of the French "realist," Duguit,[2] its main contentions have gone upon a mission to the United States. As the result of a study of the actual and even recent history of the churches, trade unions and other communities, it has been suggested by this school of thinkers that corporations have a "real" personality, and that, in the face of rights inherent in such personality, the sovereign power must act upon no more dominating theory than it would act in the face of the rights of individuals. The promoters of this theory are careful to safeguard it from an anarchic implication. They profess to enrich the state by equating with obligations to the sovereign other loyalties, but they tie them all together by differentiating between the scope of each. The activities comprised in one should not, they say, be any way identical with those demanded in any of

[1] *E. g.* Figgis, *Churches in the Modern State.*
[2] See *Harvard Law Review*, November 1917.

the others. It is not, therefore, an anarchic theory, but, rather, constitutional in its intentions.

This conception of sovereignty, differing alike from that of Austin and that to which Lord Bryce and others of his school subscribe, has been worked out with great ability. If one can reconcile oneself to the conception of personality apart from consciousness, and can feel that the attribution of personality to a community or group is anything beyond a useful but metaphorical expression,[1] it would seem to be a conception which presents attractions. Failing that, it would appear most helpful to regard what has been written in this connection as an attempt to express repugnance for all theories which, in defining sovereignty, over-emphasise its association with arbitrary power [2] and ignore the existence of rights which may not properly be set aside. Even as such, it has a high importance.

The truth indeed would seem to be that in defining sovereignty we should be prepared to reconsider the connection which is now usually held to exist between sovereignty and fundamental rights. In a word, that we should be prepared to find in the pre-existence of lawful rights reason for the existence of sovereignty; [3] to postulate certain fundamental ethical rights, to define them as rights attaching to the individual, to conceive sovereignty as existing to preserve, increase and minister to these rights in a particular manner, and to regard it as a meaningless phrase if these conditions are not satisfied.[4] That

[1] Duguit is most careful to safeguard his theory from attributing metaphysical personality to the state. Some of the "realist" school are less careful to avoid doing so.

[2] These realist theories originated in a reaction against the "concession" theory of corporations.

[3] The similarity between this point of view and that of not a few thinkers of the Middle Ages is obvious. It is not possible, however, within the limits of the present paper to trace this somewhat analogous train of thought and to explain the real difference which exists between the two.

[4] Foremost in interest among such rights to-day is that of individuals to combine, both in order to protect their individual rights from molestation and to satisfy the human craving for association in the pursuit of common ends, religious, artistic or political, and in the securing of values only securable in association. There is no question here of the philosophically dubious corporate personality, yet the desired protection to corporations is afforded.

there are fundamental rights of the nature described will scarcely be questioned. Outside a frankly hedonistic despotism the problem for any community will always be the enforcement and the protection of them. In this the scope and nature of authoritative sovereignty emerges. Definitions of the phrase more legal in their nature have proved their inability to satisfy the very lawyers whose direct ancestors first framed them; nor does a way out of the difficulty lie along the path of distinguishing an "actual" from a "legal" sovereign. He who pays court to such a method and seeks to define the "actual sovereign" in any state will only find himself confronted in the end with the interminable and ever-shifting problem of analysing the distribution of effective power in the state or with arid speculation as to which sections of the community could, if they would, proceed to dominate the whole.

We have been speaking of internal sovereignty, but the chief concern of international lawyers is external sovereignty. Here we must relentlessly apply the same considerations, and here, too, definition is important before the pronouncement can be made that "the external sovereignty of states is interfered with by the League of Nations." It is necessary first in this connection to examine the nature of the League. It is necessary in the second place to inquire whether, except by giving to the word the highly legal or the highly "actual" sense,[1] except, in other words, by adopting a point of view which has proved inadequate in talking of internal sovereignty, external sovereignty can, under present-day conditions, be declared to have any true existence: whether, in other words, in so far as authoritative sovereignty is conceived to exist in order to minister to ethical rights, it may not in external affairs find existence only through some such processes and machinery as will arise out of the League of Nations.[2]

[1] It is strictly improper, but pardonable as convenient, to speak of an "actual" point of view of sovereignty, when by this is meant a view which distinguishes between a legal and an actual sovereign and lays emphasis upon the importance of the latter.

[2] Westlake distinguishes internal from external sovereignty, declaring that their natures are altogether different (*International Law*, Vol. I. p. 21),

It is, of course, a commonplace to assert that the framers of the League of Nations did not have it in mind to erect a superstate. In the official commentary upon the League they specifically disclaim any such intention, and it is commonly acknowledged that they have not done so. There is, however, the view, behind which is good authority, which conceives of the League's formation as a great federating act of all the nations, and which sees in the Paris Conference, which gave it birth, nothing less than a constituent assembly. Those who hold such views naturally turn to the federation of the United States to find analogies. They see a union, formed by the deliberative act of thirteen states, and the scope of the union defined—not at the first attempt, it may be noted—by a rigid constitution. The most interesting feature of the constitution is, without doubt, the Supreme Court, the first tribunal of the modern world successfully erected to judge in suits where sovereign states are suitors. It is a court whose composition and whose powers are carefully restricted by definition and whose early history, particularly after one test case of vital significance,[1] shows it most anxious not to claim a competency that oversteps these limits. Its striking political tact, displayed in these and all directions, together with the characteristically legal bent of American public opinion, lie at the root of the triumphal progress by which these thirteen states, and their successors, were, by sweet reasonableness and by relentless logic,[2] induced to plead their causes at the bar. How readily it all fits in! How simple, *mutatis mutandis*, to argue by analogy, to enunciate the truism that the men of to-day are hewing an identical path through the tangle of identical difficulties.

Can we assure ourselves that this is happening? There are

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but, as he points out, he is speaking in the one case of the Austinian conception of internal, and in the other case of an "actual" conception of external sovereignty, and I can claim that his great authority is in no sense against the view advanced above.

[1] The decision in *Chisholm* v. *The State of Georgia* (2 Dallas, 419), given in 1793, which led to the famous XI amendment of the constitution.

[2] The classical instance of this is the long-drawn-out litigation in *Rhode Island* v. *The State of Massachusetts*.

features which provoke a doubt. The first reason for federation in America was the necessity for a joint and a consistent foreign policy for the newly-created states while they recovered from the first shock of independence. In the primary place, also, the constitution still continues to fulfil this function of external policy. Can it be alleged that this is an aspect of primary importance in a League of Nations? In proportion as it approximates to being a League of all the Nations the external problem disappears. It is true, as has been suggested,[1] that an important function of the League is to provide a bulwark in the world for the national as against the Bolshevistic spirit. There will be work, too, to be done under the mandatory of the League in suppressing disorder in the remoter parts of Europe, Africa and Asia. But in a survey of the League's activities, while these functions are both real and important, they occupy neither an engrossing nor a primary position. They compare rather with constabulary work within a state than with the conduct of its foreign policy. The framers of the American Federation bethought them of the European Chancelleries, which some of them had seen and all mistrusted. The framers of the League of Nations had no external bogey of that nature to disturb them. It was of the essence of their scheme that it was all-embracing.[2]

In discussing the nature of the League of Nations we are not, therefore, helped by talking either of a superstate nor yet of a federation. Professor Pollard and Sir Frederick Pollock have blazed a much more hopeful trail. They have indicated the existence of helpful analogies in the sphere of English Constitutional history, in the growth of the king's peace and in the action of the royal writs. They rightly single out the kernel of the League, the so-called "moratorium clauses," by the action of which the nations bind themselves not to go to war till time has been allowed for the submission of the dispute to arbitration. In

[1] Among others by Lord Eustace Percy.

[2] That it has not altogether been so is due to other and to transitory causes, but even under this incompleted guise the United States dreaded a unity in which its cherished policies might fail to find expression and shunned the shifting of all disputes from their respective settings to the chambers of the world in council at Geneva.

the days of Henry II, the writs of entry into the king's court, devised for dealing with disputes concerning real property, did provide a method for avoiding baronial violence, of which the baronial landlords themselves appear to have grown weary. "Amateur historians," writes Mr. Pollard, "may reply that it was an easy matter for the king because he had the machinery of the state behind him. But in fact there was hardly a national Government at all; there was no standing army at the Crown's disposal for the purpose, no police, no public opinion; and the combatants were as much addicted or inured to the arbitrament of the sword as nations are to-day." [1] The King's method erected no new political machinery and created in itself no new authority, and did not even operate apart from a conscious demand for such operation from those who quarrelled about land. The parallel with the League of Nations as regards its functions is extremely close. The prospects of the League are still uncertain. If the rights of humanity and the real values, for the expression and for the securing of which it has been formed, do come into their own through its machinery, it will remain the truth to say that, apart from a conscious recognition of such rights and a demand for the operation of such machinery, no such assertion of those rights could ever have been reached. It is mindful of this that one may assert, what is the main contention of this paper, that in so far as the League of Nations supplies a mechanism for the preservation of these rights and values, the conception of sovereignty, with its necessary implication of moral authority, can for the first time be applied to external affairs in a more adequate sense than as a mere assertion of the unchecked power either of the states or of some central federation.

Such an assertion borders on the paradoxical. It may well be urged that the conception, which lies behind it, does not sufficiently emphasise the authority of the nation state, and, from the point of view of practical men, can hardly result in anything but a restriction of its future scope. A philosophic theory may be written down as fantastic which minimises the importance of power which for at least three hundred years has

[1] Pollard, *The League of Nations:* An historical argument, p. 53.

hardly known a limit; power which, from another point of view, has presented the appearance of a precious, if a lawless, freedom from control. No man of sense can look with unconcern on the impoverishment of the life of the state, and a theory, which declares that what has always been termed the external sovereignty of states involves an improper use of the word "sovereignty," may seem to lead to that result in practice and, if accepted, hold out a gloomy prospect of restricted action in the future. Need it necessarily do so?

Metaphors are metaphors, but they may be employed to illustrate a truth. We have heard much in recent times from the psychologists as to the existence of a subconscious sphere, whence flow into the consciousness of the individual motives and promptings, which in certain circumstances dominate his action. In the light of this image and for the purposes of illustration only we may visualise the nation state. We may compare its political life to consciousness in which at different times different values and interests have played a dominating part. There have been epochs when religion loomed so large in the consciousness of nations that every action of the state embodied—was bound to embody—the attitude of one or other of the religious parties of the day. It is hard to say, for instance, whether the Revocation of the Edict of Nantes was primarily a political or a religious act. But religious wars were possible only so long as, before the growth of indifference or tolerance, men conceived religion as an object about which it was worth while to fight, and so long as the consciousness of states embodied this idea. It has been precisely the same story with racial promptings, from which European countries once felt so conscious a reaction, though now in many cases they are free. The most recent stage has been a period in which the consciousness of nation states has been dominated by what may be termed imperialism, a period in which sovereignty in international affairs could never be conceived apart from a confusion of it with arbitrary power.

From the beginning of this epoch there have, however, been warnings that the subconscious sphere might yet contain surprises, and that to the conscious sphere new forces might demand

admittance. In recent times the process has been much accelerated. The extension of the Governmental activity of states bears witness to the fact that a whole range of subjects occupies the consciousness of nations, of which there was little or no trace a hundred years ago. Individual opportunity for self-development, the product of political democracy, has in turn involved an alteration in the scale of man's exploitation of the resources of the earth. In mining and in engineering, in locomotion and in transportation, man's efforts are likely to be transferred from a hitherto Lilliputian to a Brobdingnagian scale. The resources of science may be expected to give a grasp of the principles of preventative medicine which may well make our successors impatient of the practise of hygienic measures upon any but a gigantic scale. From the developments of social science we are likely to see spring reforming measures compared with which our efforts up to date may well seem puny: and the combinations for that purpose, which efficiency will call for, may transcend the limits of any "Sherman law" imagination. We are on the verge of developments in education, beside which German educational reforms during the century after the Napoleonic epoch were but a flash in the pan. The niggardly, the tinkering, the half-hearted attitude of mind towards these matters may become as rarely manifested as that of the professing sceptic in the Middle Ages; and the passionate interest engendered by them may come in time to indicate an all-sufficient scope for the activities of nation states.

There is another point. These various activities have this at least in common, that in them all to achieve the best results a state of peace is highly advantageous and in some respects essential. Without a peace, embracing all the civilised countries, the individual nations are restricted in working out their own solution to each problem and hampered in co-operating to give each other's efforts greater force. We may yet reach the stage when a war against a neighbour may appear an intolerable interruption to a war against bad housing or a plague, much as a stage was reached at which baronial wars were doomed by a transference of interest to other quarters. The very engrossing character of

the many questions which, bursting all barriers, force, and will force, their way into the consciousness of the various states to-day, not only supplies material for the internal political life but will feed the hunger for a recognition of authoritative sovereignty in international affairs; a craving for the recognition, too, of rights and values, apart from which, as is above maintained, sovereignty can have neither authority nor real meaning.[1]

[1] Since writing the above I am delighted to find that the above outlined contention does not largely part company with that suggested, from a rather different point of view, in Mr. Clement C. J. Webb's 2nd Series of Gifford Lectures, "Divine Personality and Human Life," Lecture VI.

THE LEGAL POSITION OF MERCHANTMEN IN FOREIGN PORTS AND NATIONAL WATERS

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§ 1

THE doctrinal controversy as to the extent to which merchant vessels in foreign ports or harbours are subjected at international law to the territorial criminal jurisdiction of the foreign state is well known, and its practical importance is shown by certain comparatively recent incidents which indicate the absence of any generally recognised rule on the subject and the extreme desirability of removing a fruitful source of international friction, by general understanding. The purpose of this paper is to set forth the rival systems, the underlying principles, and to suggest the basis of a general agreement.

The rival systems are the British, to which, it is understood, the United States adheres save in cases covered by express convention, and the French, which counts numerous adherents among the less important maritime powers, as well as the Institute of International Law.[1] Both systems have this in common that they deny to foreign merchantmen exterritorial privileges, but they differ alike in basis and in essential character. The British system, on the one hand, asserts in theory the complete subjection

[1] The French system has been adopted in Portugal, Mexico and Brazil by legislation (Clunet's *Journal*, 1876, p. 423) in Italy, Belgium and Greece by administrative decree (*ibid.*, p. 414) and in the United States by Treaty, *e. g.* Consular Conventions with France, February 23, 1853, sec. 8 (as regards internal discipline), and with Germany, December 11, 1871, sec. 13 (U.S. Treaties in Force, 1894, pp. 268, 283). On this subject see Despagnet, *Cours de Droit International*, 3rd ed., 1905, p. 289, and van Praagh, *Juridiction et Droit International Publique*, 1915, pp. 517–18.

For the Resolutions of the Institute of International Law, see *Annuaire*, XVII., 1898, p. 273.

of the ship to the territorial jurisdiction—tempered in England as regards civil jurisdiction by certain limitations in matters not vitally concerning the littoral state, of which, however, the latter is the sole judge. On the other hand it claims, as regards British ships in foreign ports, a complete but concurrent criminal jurisdiction which it is also prepared to concede, as regards foreign ships in British ports, to their flag state. The basis of this system is recognition of the principle of international law that jurisdiction is normally co-extensive with territory, affecting all persons or things physically present within it, unless they are exempted by treaty or a universally accepted immunity.

The French system, as formulated in the celebrated Avis du Conseil d'État of November 20, 1806, while maintaining the same fundamental rule of subjection to the local jurisdiction, expressly renounces French jurisdiction over matters of internal discipline, and over crimes and offences committed on board by members of the crew, yet retains in reserve the right of the littoral state to intervene even in cases of the excepted class where persons are involved who are strangers to the vessel, or where the peace and good order of the port is actually compromised, or where the assistance of the local authorities is invoked. In the excepted cases jurisdiction belongs exclusively to the flag state and is exercised by the local Consul, and in such cases the French Consul is instructed to dispute the competence of the local authorities should they attempt to assert it, as regards French vessels in foreign ports.

Admittedly derogating from principles of international law, this system is based not on legal rule but on a conception of state interest leading in specified cases to a renunciation of local jurisdiction. Although its application in France is not subject to reciprocity, the French Government expects that it will be applied by foreign Powers to French vessels in their ports.

The French system, it is claimed, serves the ends of justice by ensuring due punishment by the law of the flag state for crimes and offences committed, and promotes the interests of navigation by preventing avoidable detention of the vessel. It is extensively adopted by states other than France, either by domestic legisla-

tion, or consular convention, or judicial decision on the basis of reciprocity. Both systems, it remains only to add, apply primarily to foreign vessels lying in waters admittedly national of a foreign state, *e. g.* ports, harbours, roadsteads, estuaries, or other enclosed waters. In territorial waters in the open sea—more appropriately described as the marginal belt—in which a maritime state possesses if not sovereignty at least rights of jurisdiction, the right of innocent passage universally accorded to foreign merchantmen suggests reasons for limiting the exercise of the local jurisdiction to acts taking place on the foreign vessel which directly affect the interests of the littoral state or its nationals. To this consideration due practical effect is given as regards criminal jurisdiction over foreigners by the British system in the Territorial Waters Jurisdiction Act, 1876 (41 and 42 Vic. c. 73).[1]

§ 2

Of the recent incidents, to which reference has been made, the latest in 1911 raised the question of the right of the master of a French steamer (*Amiral Hamelin*), lying in Bathurst, British Gambia, to resist the execution of a warrant issued by the local Chief Magistrate for the arrest of members of her crew charged, on the complaint of a fellow-seaman (a British subject), with assault committed on him on board the vessel while lying in the said port. The Master's refusal was based on the French Maritime Code under which cognisance of offences committed on board and not disturbing the peace of the port belongs exclusively to France.

Two earlier cases in 1905 and 1909 raised, without settling it, a question of greater practical importance, viz.: the right of British police authorities to execute, without the consent of the flag state, on board a German liner calling at Southampton Water for the purpose of commerce, a provisional warrant, issued under the Fugitive Offenders Act, 1889, for the apprehension of a foreign

[1] Viz.: by the requirement that in respect of a crime or offence committed in the open sea within a marine league of low water mark in H.M. dominions no proceedings, except preliminary investigation before a Justice of the Peace, can be taken against a foreigner except with the consent and certificate of a secretary of State, or, in a colony, of a Governor.

passenger against whom a warrant of arrest has been issued in Cape Colony. The essence of the British case was that a foreign merchantman, enjoying no immunity from the local jurisdiction, becomes subject to the local sovereignty by entering a British port or roadstead and is to be deemed "territory" on which the King's writ runs, and from which under the said Act a fugitive offender, after apprehension, may be returned to another part of H.M. dominions. No question of extradition, which is in general governed by treaty stipulations, was involved. The German Government, on the other hand, contended that the consent of the flag state (which had not been asked for), was a condition precedent to the exercise of the right of arrest.

In all of these cases arrest was frustrated by the master's refusal of consent, and in none was his act disavowed. The French Government justified the conduct of their national by reference to the terms of the Avis du Conseil d'État of November 20, 1806, and the German Government, while founding also on the principles of this decision (which in no way justified their contention), declared that they held the consent of the flag state to be a condition precedent to the exercise of the right of arrest on a foreign merchantman temporarily lying in a port.

§ 3

The Avis du Conseil d'État of November 6, 1806

In France under the old regime, as well as in the Revolutionary period, criminal jurisdiction was primarily based on the principle of the locality of crime, but French jurisdiction was asserted not only over all crimes and offences committed on French soil, but also over all crimes and offences committed by Frenchmen anywhere. (Ordinance of 1681, Tit. 2, sec. 10; Decree of August 9–13, 1791, Tit. 3, sec. 12.) Thus claim was made to exclusive jurisdiction over all offenders, native or foreign, by virtue of the *lex loci delicti commissi*, and over all French offenders by virtue of the *lex ligeantiæ*. And to safeguard the latter jurisdiction certain old ordinances (February 18, 1687, April 15, 1689, May 24, 1728) forbade Frenchmen—including, therefore, seamen on French

vessels—to bring complaints before foreign authorities, and enjoined them to address themselves to the Consuls of France.

From an early period alien merchants settled in France had been permitted by treaty to resort to the French Courts, a concession which was regarded as an honour. And by Treaty again provision had been made for enabling the relations of masters and crews to be regulated by the Consuls of the parties to the Treaty.

According to M. Rostworowski,[1] who has examined all the French Consular Conventions on the subject, half the Treaties of the eighteenth century, beginning with that of March 31–August 11, 1713 with Great Britain, are concerned with defining the part to be played by the Consuls in respect of claims between master and crew of ships of their nation, and not with reciprocal abandonment of jurisdiction over foreign vessels.[2]

With the same object of defining the respective jurisdiction of local authorities and Consuls, a Convention had been made with the United States on February 14, 1788, Art. 8 of which authorised the Consuls to exercise police over all vessels of their respective nations and conferred on them all powers and jurisdiction in civil matters as well as entire inspection over the said vessels and crews;

"well understood that the functions hereby allowed shall be confined to the interior of the vessels and that they shall not take place in any case which shall have any relation with the police of the ports where the said vessels shall be."

The territorial sovereignty was safeguarded by the provision in Art. 10, that

[1] *Le régime juridique des navires de commerce dans les ports étrangers* in *Annales de l'écoles des sciences libres*, Vol. IX. (1894) p. 696, and Vol. X. (1895) p. 33.

[2] Art. 7 of the Treaty quoted, the object of which is to prevent arbitrary arrests, prescribes that the regular exercise of jurisdiction shall be respected "on account of debt or crime committed." And Art. 14, relating to private disputes between a master and his crew arising in port, directs the local judge, if appealed to, to require the defendant to give to the claimant a declaration in writing attested before the judge promising to answer in his own country "before a competent judge, and in respect of the said declaration the seaman shall not be permitted to abandon the vessel or to cause any hindrance to the captain of the vessel in the prosecution of the voyage."

"in case where subjects or citizens of the respective countries shall have committed any crime or violation of public tranquillity, they shall be justiciable by the local judges."

This rule was not invaded by sec. 12, which confers on the Consul the right of determining either by a "remit to arbitrators" or by "a summary judgment"

"all disputes and litigations between their nationals and particularly all disputes relating to wages and the conditions of engagement of the crews of the respective vessels, and all disputes of whatever nature which may arise between members of the said crews or between certain of them and their captain, or between the captains of several national vessels."

It was when this Convention was in force that the cases of the *Sally* and the *Newton* arose in 1805 and gave rise to the famous Avis. The *Sally* was an American merchant vessel in the Port of Marseilles, and the *Newton* a vessel of the same nationality in the Port of Antwerp, then under the dominion of France. In the case of the *Sally* the mate, in the alleged exercise of discipline over the crew, had inflicted a severe wound on one of the seamen, and in that of the *Newton* one seaman had made an assault on another in one of the ship's boats. In each case exclusive jurisdiction was claimed by the proper Consul of the United States and also by the local authorities, but the Conseil d'État, a branch of the political department of the Government of France, decided against the local authorities on the ground that the offence complained of did not disturb "the peace and tranquillity of the port." As the opinion, which is not readily accessible in modern English text-books, is commonly treated by certain French writers as declaring the law of nations on the legal regime applicable to foreign merchantmen in territorial waters, and has been frequently adopted both in legislation and convention, a translation is appended.[1]

Opinion of the Conseil d'État, approved November 20, 1806, *on the jurisdiction over offences committed on board neutral vessels in French ports and roadsteads.*

"The Conseil d'État, having on remit made to it by His Majesty, heard the report of Section de Legislation on that of the Grand Juge, the Minister of Justice, to define the limits of the jurisdiction claimed by the U.S. Consuls at Marseilles and Havre respecting delicts committed on board vessels of their nation lying in French ports and roadsteads.

[1] From the French text in Perels; *Das Int. öffent. Seerecht der Gegenwart*, 2nd ed. (1903), p. 62.

"*Considering*

"*That* a neutral vessel cannot be considered without limitation as neutral territory and that the protection extended to it in French ports ought not to oust the territorial jurisdiction touching the interests of the state,

"*That* a neutral vessel admitted to a port of the state is completely subject to the laws of police in force at the place at which it is received,

"*That* members of the crew are equally subject to the jurisdiction of the local tribunals for offences which they may commit, even on board, against persons other than fellow-members of the crew, as well as for civil contracts which they may enter into with such persons;

"*But* if the territorial jurisdiction is undoubted in such cases, it is not so as regards offences committed on a neutral vessel by a member of the crew,

"*That* in such cases the rights of the neutral power ought to be respected touching the internal discipline of the vessel in which the local authorities ought not to interfere unless its assistance has been invoked or the peace and tranquillity of the port has been compromised,

"*Is of opinion* that this distinction, indicated in the Report of the Grand Juge and conforming to usage, is the only rule which ought to be followed in this connection.

"*And* applying this doctrine to the two particular cases in which it has been claimed by the United States Consuls:

"Considering that one of these cases relates to a quarrel which occurred in a boat belonging to the American vessel *Newton* between two seamen of that vessel, and the other to a serious assault committed by the Chief Officer of the *Sally* on one of the crew for having used a ship's boat without orders:

"*Is of opinion* that the appeal should be sustained and the French Courts should be enjoined from taking cognisance of the two cases aforesaid."

The opinion having been approved by Napoleon at the Imperial Headquarters at Berlin on November 20, 1806, acquired the same force and effect as an act of the legislature.

The Avis may be summarised in the two following propositions—

1. The local authorities ought never to intervene in acts of internal discipline occurring on board foreign merchantmen in a French port.

2. They ought equally to disinterest themselves in all crimes and offences committed on board among members of the crew unless

(*a*) their assistance has been invoked, or,

(*b*) the peace of the port has been disturbed.[1]

Hence it follows that except in the case of its aid being invoked

[1] By disturbance of the peace was meant the actual disturbance at the moment of the incident, not the moral disturbance created when it became known ashore

or of facts disturbing the peace of the port outside the foreign vessel, the territorial jurisdiction never intervenes when the crime or delict occurs on board among members of the crew, even if the victim is of French nationality. On the other hand, the intervention of the local authorities is always legitimate if the act occurred between persons of whom one at least does not belong to the vessel; or if crimes against the French State, or infringements of police regulations are involved.[1]

France energetically claims the exclusive competence of her Courts over offences committed by members of the crews of her vessels in a foreign port, and has issued stringent instructions to her Consuls to this effect (in which, as in the Consular Conventions embodying the limitation principle, it is important to notice, all reference to appeal to the aid of the local authorities as justifying their jurisdiction has disappeared).[2] On the other hand, as stated in the Ordonnance quoted below, she accords reciprocity to foreign vessels in French ports, and indeed waives jurisdiction over them within the meaning of the Avis, although they may belong to a state administering a different system.[3]

[1] The *Forsattning* (Rév. de législ. et de jurisp., 1843, p. 43), where the Conseil d'État directed the surrender to the master of this Swedish vessel of one of the crew who was accused of poisoning some of his fellow-seamen.

The *Superbo* (Rév. gen. de dr. int. pub. 1894, p. 63), where French jurisdiction was sustained over the second mate of this Austrian vessel who was charged with having insulted the harbour master of Nantes.

Scotto (Algiers, September 15, 1844. Dalloz. Repert: Organisation maritime, No. 1855). Offence against the French Government.

[2] Ordonnance of October 29, 1833, sec. 22—

" Lorsque des voies de fait, délits ou crîmes auront été commis à bord d'un navire français en rade où dans le port, par un homme de l'équipage envers un homme du même équipage où d'un autre navire français, le consul reclamera contre toute tentative que pourrait faire l'autorité locale d'en connâitre, *hors le cas où, par cet énvénement, la tranquillité du port aurait été compromise.* Il invoquera la reciprocité des principes reconnus en France à cet égard par l'acte du 20 novembre, 1806, et fera les démarches convenables pour obtenir que la connaissance de l'affaire lui soit remise, afin qu'elle soit ultérieurement jugée d'après les lois françaises."

[3] In the diplomatic correspondence with Britain following on the *Amiral Hamelin* case (1911) the French Government laid stress on this point as explaining why Britain had never experienced inconvenience from the exclusive predominance of the system of territorial jurisdiction. The French system of " partial desintéressement " had been and was still applied to British vessels in French ports without any condition of reciprocity."

In 1859 the original formula of the French doctrine suffered a modification at the hands of the Cour de Cassation, which held, in the case of Jally,[1] that crimes of particular gravity, by their very nature, disturb the peace of the port, without necessitating an enquiry as to whether they have had effect outside the vessel, and consequently that the local authorities are competent to take cognisance of them even when committed on board among members of the crew. The mate of an American merchantman, the *Tempest*, having killed one seaman and wounded another on board the ship in the port of Havre, and having been voluntarily surrendered to the local authorities, the Cour de Cassation upheld the jurisdiction of the French Courts notwithstanding the Convention of 1853 between U.S.A. and France which conferred exclusive jurisdiction on the Consuls "to take charge of internal order of merchant ships of their nation and cognisance of 'differences' between master, officers and crew, particularly relating to wages and the execution of contracts."

The Court held that the local jurisdiction was competent wherever the act was of a nature to compromise the tranquillity of the port or the intervention of the local authority had been invoked "or the act constitutes a crime by common law (*i. e.* the law common to all civilised nations) the gravity of which does not permit any nation to leave it unpunished, without infringing its rights of jurisdiction and territorial sovereignty, because the crime is in itself the most manifest as well as the most flagrant violation of the laws which it is the duty of every nation to cause to be respected in all parts of its territory."

The decision makes a noteworthy theoretical development in the French doctrine, since it attaches more importance to the intrinsic gravity of the crime than to the disturbance of the peace of the port. It appears to be followed in modern French jurisprudence.[2]

The same line was taken by the U.S. Supreme Court in the case of Wildenhus in 1886 which is mentioned below.

[1] Ortolan, *Diplomatie de la Mer*, 4th ed., p. 455. Sirey, N.S., 1859, p. 189.

[2] *Trib. de simple police de Marseilles*, July 11, 1908, *Journal de droit int. privé*, 1908, p. 147 (cited by van Praagh, *Juridiction et droit int. public* (1915), p. 516.

Even in France where the doctrine of the Avis du Conseil d'État prevails, the Government has asserted the right to arrest a military deserter who had taken refuge on a foreign merchantman anchored in French waters. A circular of the French Minister of War of July 29, 1899,[1] quoting the opinion of M. le Garde des Sceaux in a case of this nature, laid it down that —

"que d'apres une regle de droit international public reconnu par la grande majorité des nations, et consacré par la jurisprudence française, les navires de commerce étrangers ne jouissent pas du privilège de l'extérritorialité; en consequence les personnes qui se trouvent à bord de ces navires sont justiciables dans les termes d'un avis du Conseil d'État du 20 novembre, 1806, des tribunaux du pays dans les eaux territoriales duquel ils sont mouillés, et les autorités peuvent instrumenter sur le navire de commerce étranger, et y proceder à l'arrestation des délinquents *qui relevent de leur jurisdiction.*

"C'est donc cette solution qui doit être adoptée. Afin toutefois d'éviter toute difficulté diplomatique, il sera indispensable de donner avis au consul interessé des arrestations, visités et perquisitions faites à bord d'un navire de commerce étranger."

Criticism of the French System

Despagnet, a powerful critic of the system, submits two orders of objection.[2]

From the point of view of practical interpretation it conduces to arbitrary decisions and conflict. What test, he asks, is laid down to determine whether public order in a port has been disturbed so that the local jurisdiction is competent, and who is to be the judge of this point, if not the local authority, itself a necessarily interested party? On the other hand, the fact that appeal to the local authority involves waiver of the flag state's jurisdiction will often lead its representative to hesitate to make the appeal, even if urgently required. Again, so vague are its terms that the Avis appears to contemplate appeal by any one, not merely by the master but by the victim or even the author of the offence! In claiming jurisdiction under these vague and elastic terms the Consul and the local authority may show equal

[1] *Journal de droit international privé*, 1900, pp. 681, 682.

[2] *Loc. cit.*, p. 290. Among other continental critics may be mentioned Fedozzi in R.G.D.I., IV. pp. 215–16, and 223; cf. 214 note 1. Rostworowski, *loc. cit.*, and a very learned Dutch writer, van Praagh: *Juridiction et droit international publique* (the Hague, 1915), pp. 517, 524–536.

energy which conduces to conflict,[1] or equal apathy not conducing to the punishment of offenders.

But it is particularly open to criticism in regard to its sphere of application. Since the fundamental rule of international law is that of complete subjection of foreign vessels in ports, harbours and roadsteads to the local sovereignty, with the result that crimes and offences committed on board belong as truly to the local jurisdiction as if committed on land, the French system, from the point of theory, is a derogation from principle, inspired by considerations of convenience and interest.[2] Foreigners cannot, therefore, claim its application in the name of international law, and France cannot insist on its observance by other states. Its recognition depends on the good will of each state and on understandings established by Treaty.

Another critic points out that the modification in the doctrine of 1806 which was made in 1859 to meet the needs of practice shows that the original formula was not sufficiently elastic, but instead of an objective test it introduces one which depends

[1] See the case of the French ship *Utile* (1885) (*Journal de dr. int. privé*, 1888, p. 65). In November 1885 mutiny, complicated with brawling and involving one death, broke out on this vessel in the roadstead of Piombino near Leghorn. The French Consul at Leghorn, on receiving news by telegram, immediately sent his chancellor to hold an enquiry and gave orders, in terms of the Consular Convention, to prevent the Italian authorities from going on board the vessel. The Prætor of Piombino, urged by popular clamour, claimed jurisdiction of the affair, but, in view of the determined attitude of the French Consul and his deputy, agreed to refer the matter to the Ministry of Foreign Affairs at Rome, which with great forbearance admitted the rights and competence of the French Consul under Art. 13 of the Convention of July 26, 1862.

This incident shows a tendency to voluntary effacement on the part of the Italian authorities where the authorities of the flag state intervene. Although a decision of the Court of Cassation at Florence (November 24, 1864) had clearly laid down the conditions under which local intervention was legitimate, it appears to have had little effect in practice, and the Italian Government was obliged to issue a circular in 1865 recommending the local authorities not to hesitate to intervene when the peace of the port had been disturbed, or a person foreign to the ship's company and especially an Italian was involved.

[2] The Cour de Cassation in the *Tempest* case, 1859, admitted this frankly. "Attendu que l'exception même n'en est pas une, fondée qu'elle est, non sur l'incompétence de l'autorité locale à raison des personnes, *mais sur une espéce de partipris par la pluspart des États civilisés, de ne voir dans de tels délits que de simples infractions à la police intérieure des navires.* (Quoted by Rostworowski, *loc. cit.*, Vol. X. p. 43, n. 7.)

essentially on the impression of the judge as to the gravity of the occurrence. It would seem more reasonable, he says, to abandon the formula in this shape, and abandonment implies reversion to the British system.[1]

Is the French System part of International Law?

There is no reason to dissent from the statement of Hall, who is by no means a convinced opponent, that the French system cannot as yet claim to be of compulsory international authority.[2] Several countries have adopted either the original French formula or that of the decision of 1859 (in the *Tempest* case) with more or less important modifications. Among these are in Europe: *Italy*, *Belgium*, *Portugal*, *Greece*, and *Norway*; and in America: *Brazil*, *Mexico*, and *Peru*. *Russia*, on the authority of F. v. Martens,[3] may be reckoned as an adherent to the formula of 1859.

In Germany the practice of the Court appears to follow the British system, though the opinion of text-writers is divided. Van Praagh,[4] in answer to an enquiry, was informed by a member of the Upper Hanseatic District Tribunal at Hamburg that delicts committed on board foreign merchantmen in the port of Hamburg are treated as belonging to German jurisdiction. It appears there is no decision of the Imperial Supreme Court in point, the nearest being a case in 1880 relating, however, to a crime committed not against a member of a foreign crew but a German official.[5] The Upper Hanseatic Tribunal in 1895, in dealing with German authority over a German merchantman in non-German territory,[6] expressed the opinion *obiter*, on the authority of Heffter and Stoerck,[7] that states do not as a rule interfere in the internal

[1] van Praagh, *loc. cit.*, p. 517.
[2] *International Law*, 7th ed. (1917), p. 214.
[3] *Traitée de droit int.*, III. sec. 88, p. 34–6.
[4] *Loc. cit.*, p. 518, n. 1386.
[5] *Entscheid. Strafsachen*, II. p. 17.
[6] Vogt, *Entscheid. des Hans. Oberl. Ger. in Strafsachen*, 1899, p. 418.
[7] Heffter, *Völkerrecht*, sec. 79; and Stoerck in *Holtzendorff's Handbuch*, II. sec. 88.

affairs of a foreign vessel unless their own interests are affected, and especially the peace of the port or coast is disturbed.[1]

The Prussian Ministry of Justice by circular of 23rd September, 1904 (series A, No. 90) directed that in Prussian seaports (excluding Rhine ports) foreign consular agents should be invited to be present at the performance of all official acts (including search or detention of ship, arrest, provisional arrest or interrogation) on board vessels belonging to the state of the consular officer concerned, as well as at the examination of the crew on land before the authorities of the port in which the vessel lies. In case of urgency not suffering delay, invitation to the consular officer may be dispensed with, but intimation of the facts must be made to him as soon as possible after completion of the official act of interrogation. Similar instructions, the object of which was to prevent misunderstanding, and to rectify possible errors, had been issued by the other Maritime States of Germany.

The provisions had no application to visits by the Customs or Sanitary Police Authorities, or the Collector of harbour dues;

[1] The German domestic ordinances quoted by Perels (*Das int. öffent. Seerecht der Gegenwart*, 2nd ed., 1903, p. 63) are far from ranking Germany among the adherents to the French system.

It is true that under the German Seamen's Ordinance of June 2, 1902, sec. 129, a seaman is forbidden to take criminal or civil proceedings against the Master of a German ship before a foreign Court, where the master is subject to the jurisdiction in Germany. The penalty is liability for all damage resulting from contravention thereof, as well as forfeiture of all wages earned up to the date, the prohibition not applying, however, in the event of compulsory sale of the vessel, to enforcement of a seaman's claim for wages. Provision is made for settlement of disputes between master and crew before a German Mercantile Marine Board.

On the other hand, the unsettled state of international law is explained in a Supplement to the German Consular Instructions, of February 22, 1873, with reference to consular exercise of police authority over German ships in foreign ports. Emphasis is laid on the fact that there is no agreement among states as to which police authority merchantmen in foreign harbours are subject, and after mentioning the different national views held on the question, the Instructions add that it was not the intention of the Consulate Law, in granting to German Consuls the power of exercising police authority, to pass upon this disputed question of international law. On the contrary, the Statute presupposed that Consular exercise of police authority is permitted by the laws and customs prevailing in the consular district.

they applied, however, where members of the crew or officers applied to make depositions or other declarations before the local authorities.[1]

In *Austria-Hungary* the French system does not appear to be followed, nor in *Chile* or *Ecuador*. The *Argentine* appears to follow the British system.

As to *Holland*, van Praagh [2] states that the Avis of 1806, which became binding on Holland after her annexation to France in 1810, was formally abrogated as from September 1, 1886, since the Dutch Government had never recognised it as valid. In modern Dutch jurisprudence it is not treated as international law. Private enquiries made by this author as to the practice at the principal Dutch ports show that the courts, particularly at Rotterdam, regularly take jurisdiction in cases, especially of theft, which would fall under the exception if the Avis were regarded as binding.

Application of the Prussian instructions above mentioned, being dependent on treaty or reciprocity, the Netherlands Minister of Justice, in order to gain the benefit of them for Dutch ships in Prussian ports (Holland having no treaty with Prussia), instructed his officials on 22nd May, 1909, to take similar action in regard to official acts to be performed on German ships in Dutch ports.

In the *United States*, as the documents quoted in 2 Moore's Digest of International Law show, the opinion of the State Department has frequently changed. In controversy with Britain over the *Creole* case, Mr. Webster in 1842 took his stand on, and extended the doctrine of, the Avis of 1806,[3] but in 1845 the Department unconditionally adhered to the British doctrine—

[1] I am indebted to the courtesy of the *International Intermediary Institute*, recently established with powerful Dutch backing at 6 Oran-je-straat, The Hague, for a copy of this document, as well as the Service Instructions issued by the Department of Criminal Police, Hamburg, in March 1914, a translation of which is appended to the German argument in the *Burgermeister* and *Ernst Woermann* incidents (see p. 75, post).

[2] *Loc. cit.*, No. 266, pp. 522–3.

[3] 2 Moore, pp. 353–4.

"Jurisdiction of every independent nation over the merchant vessels of other nations lying within its harbours is absolute and exclusive." [1]

Similarly in 1855 and 1856, especially in two dispatches of Mr. Marcy's of April 14 and 19, 1856, to the U.S. Consul at Hongkong and the British Minister respectively.[2]

Meanwhile, Wheaton, who had originally favoured the British system, had become converted to the French (see his article in the *Rév. de dr. fran. et. étr.*, 1845, pp. 206–7, and *Elements*, sec. 2, 102–3*a* [3]), and it may have been due to his influence that a dispatch of 1873 (Mr. Fish, Secretary of State, to Mr. Schenck, November 8, 1873) inclined to support the French system, though dealing with another subject, viz. the exercise of jurisdiction by English Courts in causes arising upon complaints between masters and mariners of American ships.[4]

On the other hand, Mr. Bayard in 1885 expressed the view that, in the absence of treaty, the local jurisdiction takes precedence of the Consul's authority, which is only recognised by comity, in disputes on board not affecting the peace of the port.[5]

Mr. Bayard, in advising the President in 1887 in the case of Antonio Pelletier, adopted and cited, in advance of publication, the opinion of the Supreme Court in the Wildenhus case, which was also adopted by Mr. Blaine in his dispatch of Nov. 18, 1898, on the Barrundia Case, mentioned below.[6]

In the Wildenhus case [7] the U.S. Supreme Court in 1886 took the same view of "disturbance of the port" as the Cour de Cassation had done in Jally's case in 1859. Wildenhus, a Belgian seaman on a Belgian steamer moored in dock at the port of Jersey City, having mortally wounded a fellow seaman on board the vessel,

[1] Mr. Buchanan, Secretary of State to Min. to Brazil, September 27, 1845, 2 Moore, p. 272. [2] 2 Moore, p. 290.

[3] "*Nous croyons qu'à cet égard la législation et la jurisprudence françaises ont établi de vvaies distinctions qui doivent être reconnues par toutes les nations, comme étant les plus conformes au principe du droit universal des gens.*"

[4] 2 Moore, pp. 293–7.

[5] Mr. Bayard, Secretary of State to Mr. Thomson, Min. to Hayti, July 31, 1885, 2 Moore, p. 300. [6] 2 Moore, pp. 7 and 859.

[7] 1886, *U.S. Reports*, 120, p. 1. Scott's *Cases on Int. Law*, p. 225. Reprinted in full in Stowell's *Consular Cases*, p. 447.

and having been arrested and imprisoned by the local authorities, a writ of *habeas corpus* was applied for by the Belgian Consul, founding on the law of nations and on a Consular convention between U.S.A. and Belgium of March 9, 1880, which expressly excluded the interference of the local authorities in regard to acts occurring on board, "except when the disorder that has arisen is of such a nature as to disturb tranquillity and public order on shore or in the port." The Supreme Court affirmed the judgment of the Courts below refusing the writ.

It was held—

"It is a part of the law of civilised nations that, when a merchant vessel of one country enters the port of another for the purpose of trade, it subjects itself to the law of the country to which it goes, unless by treaty or otherwise the two countries have come to some different understanding or agreement, and the English Judges have uniformly recognised the rights of the court of the country of which the port is part to punish crimes committed by one foreigner on another in a merchant ship."

That by comity it came to be understood among civilised nations that matters affecting only the vessel and her crew, and not involving the peace or dignity of the country or tranquillity of the port, should be left to the authorities of the nation to which the vessel belonged. That the usage was the opposite as to crimes disturbing the peace and tranquillity of the country, and the offender was never exempt "if local tribunals see fit to assert their authority."

On the question in hand, it was held that murder fell within the exception in the Belgian treaty—

". . . . crimes which from their gravity awaken a public interest as soon as they become known, and especially those of a character for which every civilised nation considers itself bound to provide a severe punishment when committed within its own jurisdiction. In such case enquiry is certain to be instituted at once to ascertain how or why the thing was done, and the popular excitement rises or falls as the news spreads and the facts become known. It is not alone the publicity of the act, or the noise and clamour which attend it, that fixes the nature of the crime, but the act itself. If that is of a character to awaken public interest when it becomes known, it is a 'disorder' the nature of which is to affect the community at large, and consequently to invoke the power of the local government whose people have been disturbed by what has been done. The very nature of such an act is to disturb the quiet of a peaceful community and create, in the language of the treaty, a 'disorder' which will disturb tranquillity and public order on shore or in the port.

"The principle which governs the whole matter is this: Disorders which disturb *only* the peace of the ship or those on board are to be dealt with exclusively by the sovereignty of the home of the ship, but those which disturb the public peace may be suppressed, and, if need be, the offenders punished, by the

proper authorities of the local jurisdiction. It may not always be easy at all times to determine to which of the two jurisdictions a particular act of disorder belongs. Much will undoubtedly depend on the attending circumstances of the particular case, but all must concede that felonious homicide is a subject for the local jurisdiction, and that if the proper authorities are proceeding with the case in a regular way, the Consul has no right to interfere to prevent it. That, according to the petition for the *habeas corpus*, is the case."

The judgment referred in detail and with approval to the decision of the Cour de Cassation of 1859 in the case of Jally above mentioned.

So far as concerns the practice of individual states, therefore, the permanent adherence of Britain to a different system, and the altered attitude of other states, certain of which (United States, France and Holland) formerly followed, but now no longer adhere to, the French system, make it impossible to assent to the claim of certain French writers that the Avis of 1806 forms a rule of customary international law.

Nor is the claim from the extensive adoption of the principles of the Avis in Consular Conventions better founded. Extremely numerous as these Conventions are, Great Britain is a party to none of them, and they may be fairly regarded, in the words of Hall, as stipulating " for practices which the contracting parties wish to incorporate into the usages of the law, but which they know to be outside the actual law." [1] What makes this conclusion the more justified is that the clauses are not only far from uniform in the different treaties, but are difficult to reconcile with the principle which is claimed to be embodied in them. To take only a minor point, it is highly debateable whether under the clause disturbance of the peace of a port means actual disturbance or moral disturbance.[2]

[1] Hall, *loc. cit.*, p. 8.

[2] An exhaustive examination of the Treaties to which Holland is a party is to be found in van Praagh, *loc. cit.*, pp. 528–32, and of the French Conventions in Rostworowski, *loc. cit.*, Vol. X. pp. 25 *et seq.*

§ 4

The British System

Under the common law of England the seaward boundaries of the realm are low-water mark on the coasts, with an exception in regard to harbours, bays, estuaries, and other landlocked or enclosed waters [1] which, to some extent, and in some cases, are included in the adjacent territory. Judicial authority on the subject is scanty, but in *R.* v. *Cunningham* [2] the Court of Crown Cases Reserved held that the whole of the Bristol Channel between Somerset and Glamorgan was part of the United Kingdom for the purpose of exercising jurisdiction over a crime committed by a foreign seaman on board a foreign vessel anchored in Penarth Roads, and in *Direct United States Cable Company* v. *American Telegraph Company* [3] it was held by the Privy Council that the Bay of Conception in Newfoundland was part of the Colony of Newfoundland. It is true that the law of England affords no definite and authoritative test for distinguishing between land-locked waters on the one hand, and the open sea on the other,[4] but in none of the recent controversies did the question arise, since the port of Bathurst in British Gambia was clearly under

[1] Bays and creeks are, or are capable of being declared, territorial. "That arm or branch of the sea which lies within the *fauces terrae* where a man may reasonably discern between shore and shore, is, or at least may be, within the body of a county, and therefore within the jurisdiction of the sheriff or coroner." Hale: *de Jure Maris* (Hargreaves Law Tracts), c. 4, p. 10. A more limited definition was adopted by Lord Coke, who considers the line to be confined to such parts of the sea where a man standing on the side of the land may see what is done on the other" (2 East P.C., c. 17, sec. 10). In *Regina* v. *Bruce* (2 Leach, C.C., 1093), in which it was held that the courts of common law have concurrent jurisdiction with the Admiralty in havens, creeks and rivers, Lord Coke's definition was preferred to Lord Hale's.

The common law of Scotland is to the same effect: "When the sea is enclosed in bays, creeks, or otherwise is capable of bounds or meiths, as within the bounds of such lands or within view of such shores, there it may become proper, but with the reservation of passage for commerce as in the land." Stair's *Institutes of the Law of Scotland*, 4th ed. (1826), 11, Tit. 1, sec. 5.

[2] Bell's *Crown Cases*, 72, 28 L.J., M.C., 66.

[3] 1887, 2 A.C., 394.

[4] See on this subject *Territorial Waters*, by Sir J. W. Salmond, 34 L.Q.R. (1918), p. 235.

the sovereignty of Britain, and Southampton Water was a part of the realm under the common law, and under the territorial sovereignty of Britain by the law of nations.[1]

That a Maritime State has full territorial sovereignty over its national waters, as above described, is universally admitted, while the nature of its rights in the marginal belt in the open sea is not free from dispute. There is no need to multiply authorities for the first proposition, but since Germany was disposed to modify some of its results in respect to her mail steamers, reference may be made to its express recognition by two well-known German writers, Perels and von Lizst.[2] It was recognised also in the Resolutions of the Institute of International Law, August 23, 1898, on the legal regime of vessels and their crews in foreign ports, which provides as follows:—

"Art. 1. The provisions of the present Reglement apply not only to ports, but also to roadsteads and anchorages, whether landlocked or open, as well as to bays and harbours which are capable of being assimilated to such roadsteads and anchorages.

"Art. 2. The said ports, harbours, roadsteads, and bays are not merely placed under a right of sovereignty of the states on the territory of which they border, but actually form part of the territory of the said states." [3]

In countries administering the common law, the principle on which the territorial sovereignty is extended to foreign merchantmen in ports and national waters is that derived from the Dutch writers of the seventeenth century on the conflict of laws, viz. that foreigners, including foreign ships, by their presence within the territory become *subditi temporarii* enjoying the protection of, and hence owing obedience to, the local law. To quote the words of Marshall, C. J., in *Exchange* v. *McFaddon* (1812) [4]—

"It would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction and the government to degradation, if such . . . merchants did not owe temporary and local allegiance, and were not subject to the jurisdiction of the country."

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[1] The territorial character of the Solent, in which Southampton Water debouches, is expressly admitted by Perels, a German writer of authority (*loc. cit.*, p. 32).

[2] *Loc. cit.*, p. 65, and von Lizst: *Das Völkerrecht*, 6th ed. (1910), p. 82.

[3] *Annuaire* (1898), XVII., p. 273, and *Journal du droit international privé* (1899), XXVI., p. 894.

[4] 7 Cranch, pp. 116, 144.

Similarly in *Wildenhus'* case (1886) [1]—

"As the owner has voluntarily taken his vessel for his own private purposes to a place within the dominion of a government other than his own, and from which he seeks protection during his stay, he owes that government such allegiance for the time being as is due for the protection to which he becomes entitled."

And finally in *R.* v. *Keyn* (the *Franconia* case), 1876, Sir R. Phillimore used almost identical words [2]—

"A foreign merchant vessel going into a port of a foreign country subjects herself to the ordinary law of the place during her commorancy there; she is as much a *subditus temporarius* as the individual who visits in the interior of the country for the purpose of business or pleasure."

"It may be that the foreign state, influenced by considerations of public policy or by treaty obligations, chooses to forego the exercise of her law over the foreign vessel or crew, or exercise it only when they disturb the peace and good order of the port. This is the course which France has usually pursued; an illustration of it is furnished by the case cited from Dalloz (*Jur. Gen.* 1859, Cour de Cassation, pp. 88, 89)," (*i. e.* the *Tempest*, cited on p. 53 *supra.*).

The application of the general rule to the case of a murder committed by a foreign sailor on a foreign vessel lying at anchor in English waters is well illustrated by Cunningham's case (1859),[3] where three American mates of an American vessel anchored at Penarth Roads in the Bristol Channel, ten miles from the coast of Somerset, murdered a fellow seaman on board the vessel. They were tried, and two of them were convicted, at an assize held in the county of Glamorgan in Wales, in which county the indictment charged the crime as having been committed. On the question of jurisdiction the Queen's Bench held the indictment relevant, on the ground that the whole of the Bristol Channel between Somerset and Glamorgan was to be considered as within the counties by the shores of which its several parts are respectively bounded.

In the previous year, 1858, the same rule had been applied in Scotland, where the High Court of Justiciary, on appeal,

[1] 120 U.S., p. 1, per Waite, C. J.

[2] 2 Ex. D., pp. 63, 82. In this celebrated case the consulted Judges held by a majority of one that the criminal jurisdiction of England did not extend to acts committed by foreigners in the open sea within three miles of the coast. The decision led to the passing of the Territorial Waters Jurisdiction Act, 1878.

[3] Bell's *Crown Cases*, 86.

sustained the jurisdiction of the Sheriff of Renfrew and Bute to try an American citizen, a seaman on an American vessel, the *Ophelia*, for an assault committed by him on a fellow seaman on the said vessel, while lying at anchor at the Tail of the Bank off Greenock, in the Firth of Clyde, during a voyage from Glasgow to New York.[1]

As Sir F. Piggott points out,[2] the absence of judicial authority makes it very difficult to say how far the Courts in England are prepared to recognise an assumption of jurisdiction by a foreign state over its vessels in British ports. Certain dicta in *R.* v. *Keyn* [3] appear to recognise that the right of the law of the flag to regulate discipline on board foreign vessels in British ports will be recognised, but not to the exclusion in all respects of British law. But even on the assumption that this exception is admitted, we have no information as to how it would be applied in cases involving conflict with the local law (*e. g.* a punishment allowed by the law of the flag causing the death of the seaman). Sir F. Piggott suggests as a rule that in questions of internal order and in the relations of master and crew the law of the flag should be allowed to operate so far as the law of the harbour is not violated.

In view of the lack of judicial authority it may be well to mention an unreported case which occurred in 1891, and for the particulars of which I am indebted to the Foreign Office. A German seaman serving on a German merchantman lying in the Pool in the Thames complained to the magistrate sitting at Greenwich Police Court that the master had hit him on the head with a marling-spike while on board the vessel. The magistrate, probably acting on Sir R. Phillimore's dictum in *R.* v. *Keyn*,[4] granted a warrant, but before it was executed the German Ambassador made a strong representation to the Foreign Office

[1] 3 Irvine's *Justiciary Cases*.

[2] *Nationality*, etc., Part II (1906), p. 17.

[3] 1876, 2 Ex. D., p. 80; Cockburn, C. J., p. 202; Sir R. Phillimore, p. 82.

[4] *Loc. cit.*, p. 183. "I cannot entertain any doubt that in this country a foreign sailor complaining of ill-treatment of his master on board a foreign ship in an English port, would be entitled to the protection of an English Court of Justice."

that the magistrate's jurisdiction did not extend to disciplinary correction administered with a marling-spike or otherwise to a member of the crew of a German merchantman on board such vessel by her master. The Foreign Office declined to intervene, and the complainant was apparently induced by the German authorities to abandon his summons and sail with the vessel.

In respect of civil jurisdiction the subjection of the ship to the local sovereignty is illustrated by the well-known case of *Caldwell* v. *van Vlissingen* (1851), 9 Hare 415, 21 L.J., Ch. 97, in which the High Court of Chancery granted an injunction against Dutch subjects to restrain them from using aboard their vessels within the Dominion of England, without licence of the plaintiffs, an invention to which the plaintiffs were exclusively entitled under the Queen's Patent. The patented articles were screw propellers used on vessels trading between Holland and England, and the Vice-Chancellor gave the case of a railway engine running from Scotland to England as analogous, and refused to consider the reciprocal inconvenience of proceedings of this sort in various countries. The case was not appealed, but the English statute was shortly afterwards modified to prevent the recurrence of such hardships.[1]

To the application of the local jurisdiction to foreign vessels the British system allows three exceptions or modifications—

1. A vessel driven into a port by stress of weather, or carried by unlawful force into a forbidden port or into an open port with prohibited goods incurs no penalty in either case.[2]

2. Under the Mails Ships Act, 1891,[3] which was passed to enable H.M. Council to carry into effect conventions which may be made with foreign countries respecting ships engaged in postal service, a special procedure is provided in lieu of arrestment for founding jurisdiction or enforcing judgment against certain

[1] See Patents, Designs and Trade-Marks Act, 1883 (46 & 47 Vic. c. 57), sec. 43, now sec. 48 of the Patents and Designs Act, 1907 (7 Ed. VII. c. 29).

[2] Halleck, T., *International Law*, p. 230.

[3] 54 & 55 Vic., c. 31.

vessels which are certified by the Secretary of State to be subsidised for the execution of any postal service within the meaning of any convention with a foreign state to which the Act applies.

Subject to security being found and maintained by the owner to the satisfaction of the Supreme Court, and notice being given by the Board of Trade to the arresting authority that the vessel, whether British or foreign, is an exempted mail ship, she is free from arrest in the United Kingdom or the Colonies for the purpose of founding jurisdiction or enforcing judgment, but without prejudice to her otherwise complete subjection to the local jurisdiction. The application of the Act depends on the existence of a postal convention and on Order in Council under the Act. So far it has been made applicable only to vessels engaged in the postal service with France under the Anglo-French Postal Convention of August 30, 1890.[1] Rules of Court have been issued under the Act, but it is understood that neither they nor the Statute have been acted on.[2]

Arrest and execution of process on board exempted mail ships is regulated by Sec. 4 of the Act.

1. Where a foreign mail ship to which the action applies is in a port of the United Kingdom, no person shall be arrested without warrant on board such ship, and before any process, civil or criminal, authorising the arrest of any person who is on board such ship is executed against such person the following provisions of the section shall be observed—

(*a*) Written notice of the intention to arrest a person who is, or is suspected of being, on board the ship, stating

[1] Ratified March 23, 1891. Herstlet's *Commercial Treaties*, XVIII. (1893), p. 439.

The Orders in Council in force under the Act are as follows—

Mail Ships (*France*) *Orders in Council*, 1892 (Stat. R. & O., Rev. X. Post Office, p. 94) applying the Act to Newfoundland, Queensland, New Zealand, Cape of Good Hope, and Natal.

Ditto (South Australia and Western Australia) August 5, 1892, *ibid.*, p. 104.

Ditto (India) May 16, 1893, *ibid.*, p. 106.

Ditto (New South Wales) October 16, 1894, *ibid.*, p. 108.

Ditto (Tasmania) February 2, 1895, *ibid.*, p. 109.

[2] Mail Ships (Rules) Order in Council (1908), Stat. R. & O., 1908, p. 768.

the hour at which, if necessary, the ship shall be searched, shall, if it is a ship of a foreign state, and there is at that port a Consulate of that state, be left at the Consulate addressed to the Consular officer.

(*b*) It shall be the duty of the master, upon demand, if the said person is on board his ship, to enable the proper officer to arrest him.

(*c*) If the officer is unable to arrest the said person he may, but, if it is a foreign ship, only after the expiration of such time after notice was left at the Consulate as is specified in the Convention, search the ship for such person, and if he is found may arrest him.

2. The ship may be delayed for the purposes of this section for the time specified in the Convention, but not for any longer time.

3. If the master of a ship refuses to permit a search of the ship in accordance with this section, any officer of the Customs may detain the ship, and such master shall be liable to a fine of £500.

4. This section shall apply to the arrest of the master in like manner as in the case of any other person.[1]

Finally, the Admiralty Court requires that in actions for

[1] The wording of sec. 4 is sufficiently wide, it is thought, to cover the case of the arrest under warrant of a fugitive offender who has taken passage on an exempted mail ship in a British port outside the United Kingdom, but whether it was the intention of the Legislature to include this case is open to doubt. For example, the Mail Ships Convention between Great Britain and France of 1890, one of the Conventions which the Act was passed to enforce in the United Kingdom, would appear expressly to exclude it.

> "Passengers," says Art. 5, "on ships to which the Convention applies, who may not desire to go on shore during the vessel's stay in a port of either state, cannot be on any account taken from on board."

The case of offenders who have taken refuge on the vessel from the local law is dealt with in the immediately succeeding sub-section—

> "Nevertheless the local authorities may claim the expulsion from on board of persons wanted in pursuance of a regular warrant for crimes and offences who may have taken refuge or embarked on mail-boats, and in case of necessity searches may be carried out on board such vessels by the competent authorities. The individuals in question shall then be handed over to them."

wages against a foreign ship notice of the proceedings must be served on the Consul of the flag state, who is allowed an opportunity of protesting against the jurisdiction, though without the legal effect of thereby ousting it. Foreigners may sue for wages in the Admiralty Court, no distinction being made between claims by those serving on British ships and claims either by foreign or British subjects serving on foreign ships which happened to be in ports of the United Kingdom, but as regards claims against foreign ships the Court exercises a discretion on the following principles :—

An express provision in the ship's articles that the seaman binds himself to go before the tribunals of the flag state does not oust the jurisdiction of the Court, which, if applied to, will exercise its discretion as to whether it will entertain the action or not. If the Consul of the foreign state protests against the jurisdiction without giving reasons, the Court will proceed with the action. If he gives reasons, the Court will enquire into them, allow them to be answered and then exercise its discretion.[1] (And one of the reasons for the Court reserving its discretion is the difficulty of administering a foreign *lex loci contractus*).[2] Where the seaman has entered into foreign articles, the Court will readily infer that he has agreed to abide by the decision of the tribunals of the flag state.[3]

In a case of great hardship, where a ship is sold under decree of the Court and neither master or mariner are left with any means of subsistence, the Court might proceed in the face of the Consul's protest.[4]

The master of a foreign ship has a right to proceed for his wages in the Courts of Admiralty Jurisdiction here, although by the law of his flag he may have no lien upon the ship or freight for his wages, the question being one of remedy and therefore governed by the *lex fori*.[5]

Any question as to the contract must be determined either

[1] The *Nina*, L.R., 2 A. & E., 44; the *Golubchick*, I. W. Rob., 143.
[2] The *Golubchick* (*supra*).
[3] The *Leon XIII.*, 8 P.D., 121.
[4] The *Milford, Swa.*, 362.
[5] Merchant Shipping Act, 1894, sec. 167 (2), and the *Milford*.

by the law of the place where the contract is made or by the law of the flag; but as the contract is usually made within the jurisdiction of the country to which the ship belongs, the question must in most cases be decided by the Municipal Law of that country.[1]

Under the Rules of Court Order V. rule 16 (38) the affidavit to lead the warrant in any action of wages *in rem* against a foreign ship must state that notice of the commencement of the action has been given to the Consul of the foreign government, if there be one in London, and a copy of the notice must be annexed. It is further provided by Order V. rule 17 (39) of the same rules, that the Court or judge may in any case, if he or they think fit, waive the service of the notice. Where the foreign Consul does not interfere, the Court will consider that it has his indirect sanction, and the cause is allowed to proceed as a matter of course.

There is no similar rule in Scotland, where, however, claims of wages by foreign seamen against foreign ships have become rare since the adoption of steam. As a matter of courtesy notification to the Consul is usually given.

In the United States, the jurisdiction of the Courts over claims for wages against foreign ships is also discretionary.[2]

[1] Williams and Bruce (1902), *Admiralty Practice*, pp. 211–13.

[2] As illustrating the American practice, Perels (*loc. cit.*, p. 63) cites the case of the German steamer, *Elwine Kreplin*, which was prevented by the outbreak of the Franco-Prussian War, in 1870, from leaving the harbour of New York. The crew thereupon left the ship, at the same time making a claim for wages, which the captain refused, declaring the men to be deserters. On the German Consul approving the master's conduct, the crew sued *in rem* in the District Court of New York, which found the captain liable, but, on appeal, the Circuit Court held that jurisdiction in claims between captain and crew of German ships in American harbours was much disputed and had never been completely recognised by American Courts. Where such disputes did not amount to disturbances of the peace jurisdiction belonged exclusively to the German Consul. The case is reported in 9 Blatchford, 438, and in 2 Moore, 298. It appears to have turned on an express exclusion of local jurisdiction under treaty with Prussia of 1828.

R. M. Hughes (*Handbook of Admiralty Law*, 1901) states the American practice as follows:—

"As a rule, the Court will not take jurisdiction in controversies between the seamen of a foreign ship and her master or the ship. Many of the countries

Over crimes and offences committed by British subjects or foreigners on British ships in foreign territorial waters (including all ports, havens, and rivers below bridges where great ships go) complete jurisdiction, concurrent with that of the littoral state, is asserted by Britain under 15 Richard II, sec. 3. Thus in *R.* v. *Anderson* (L.R. 1 C.C.R. 161) manslaughter by an American seaman serving on a British ship while it was sailing up the River Garonne towards Bordeaux at a point ninety miles from the sea was held to be within the jurisdiction of the Admiralty.[1] Again in *Reg.* v. *Carr* (L.R. 10 Q.B.D. 76) the criminal law of England was held to prevail on board a British ship moored at a quay in the port at Rotterdam, at a point in the River Maas seventeen or eighteen miles above the open sea but below bridges.

By sec. 265 of the Merchant Shipping Act, 1854 (now Merchant Shipping Act, 1894, sec. 687) British criminal jurisdiction is extended to apply to "all offences against persons or property committed in or at any place ashore or afloat out of H.M. dominions by any master, seaman, or apprentice, who at the date of the offence is, or within three months previously has been employed on any British ship."

Whether the statute would apply to offences committed ashore by a foreigner who is one of the crew of a British ship was doubted in *R.* v. *Anderson* (*supra*).

The general legal position of British ships in foreign ports in regard to the local jurisdiction is thus stated in the current

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have express Treaty stipulations giving sole cognisance of these disputes to their Consuls. In cases where such a Treaty exists, the court will not interfere at all. In cases where there is no Treaty expressly forbidding it, the courts have discretion whether to take jurisdiction or not, but they will not take jurisdiction unless under extreme circumstances of cruelty or hardship. In considering this question, the nationality of the ship governs, and the sailors are all presumed to be of the same nationality as the ship, no matter what may be their actual nationality. When the court takes jurisdiction under such circumstances, it applies by comity the law of the vessel's flag." See also *The Belgenland*, 1885, 114 U.S. 355, *per* Bradley, I. Scott's *Cases on International Law*, p. 338.

[1] See also earlier decisions cited in this case—*R.* v. *Jemot* (1812) (*Russell on Crimes*, 7th ed., p. 33) and *Reg.* v. *Allen* (1 Moo. C.C., 494)—in which British criminal jurisdiction was asserted over British ships lying respectively in a natural harbour in Cuba, and at some distance up a Chinese River.

General Instructions for H.M. Consular Officers, 1907, and saving verbal amendments is identical with the statement in Phillimore, 2 Int. Law, p. 292 :—

"A British merchant ship, while in a foreign port, is subject to the laws in force at that port. No person seeking refuge on board such ships, with a view to evading the local laws, can be protected against the operation of those laws. The ship affords no harbour to any person, whether forming part of the crew or not, liable legally to be taken into custody.

"The discipline on board a British merchant ship while in a foreign port is usually allowed to be regulated by the master in conformity with English Law, and it is desirable that he should be supported in maintaining it. Consular officers should assist shipmasters in this respect, warning them, however, of any local rules and regulations which might interfere with their freedom of action.

"Whenever such rules are altered or new rules are made the Consular Officer must give information thereof to the Board of Trade."

It is nowhere better described than in Hall's *Foreign Jurisdiction of the British Crown*, pp. 80–1 :—

Great Britain fully admits the supremacy of the territorial law, not merely on land, but in the ports and harbours. She recognises that every country has the right of enforcing its own criminal laws and police regulations, and that if any offence is committed against such laws or regulations on board a British merchant ship in territorial waters or outside the ship by a person belonging to it, the offender is liable to be locally dealt with. In such cases Great Britain confines the duty of her Consuls to seeing that the person accused is fairly tried and that justice is properly administered, reserving to herself the protective rights which have been already mentioned.

"But while the supremacy of the territorial law is admitted subject to the qualifications introduced by custom and Treaties, Great Britain has the right to demand not merely that the narrowest international custom shall be observed, but that a foreign state shall act upon the doctrine held by it and usually applied, as to the due range within which it may assert its authority.

"Probably no state would be anxious to mix itself up with questions of breach of contract or other civil disputes. Were it even disposed to do so, occasions for the exercise of its jurisdiction would be few. Apart from miscellaneous disputes originating within its territory, questions arising out of contracts concluded there, and of contracts to which subjects of its own were parties, would alone be open to it. It is the usual course for the local authorities to permit the Consul to settle these matters, and not to interfere without reference to him and reason for belief that he is unable to make a satisfactory arrangement.

"In matters falling under the head of criminal jurisdiction most states allow Consuls to have exclusive charge of the purely internal order of the merchant vessels of their nation, and the local authorities intervene only when either the peace or public order of a port or its neighbourhood is disturbed, or

when persons other than the officers and crew of a ship are mixed up in the breach of order which is committed.

"The usage is sufficiently established in its head-lines to render it a fair subject of international complaint if local authorities interfere in questions of discipline which involve offences criminal by English law; and generally abstention from interference goes considerably further. On one important point custom is decisively settled. If a person on board a British ship commits a crime on the high seas and is brought in custody into a foreign port, the territorial authorities will not interfere with his being kept in custody on board, nor with his being transferred to another vessel for conveyance to England. But if a crime is committed in a port, the authorities of different countries would no doubt take different views as to what amount or kind of disturbance to the peace or order of the port should attract their notice; their right to determine for themselves in what circumstances their jurisdiction should be exercised cannot be gainsaid."

§ 5

Passengers

The legal position of passengers on foreign merchantmen is wholly unelucidated in the Avis of 1806, and all but untouched in the Consular Conventions. On principle they become subject to the law prevailing on the ship on which they embark, but as they perform no function in the navigation, they do not appear to be properly subject to the considerations which, on the French view, make for the immunity of the ship's company from the territorial jurisdiction, viz.: that the crew form "part of an organised body of men, governed internally in conformity with the laws of the state, enrolled under its control and subordinated to an officer who is recognised by the public authority,"[1] and that the exercise of local jurisdiction over them may involve detention of the ship, and even the loss of skilled assistance not always easy to replace.

Perhaps it is for these reasons that the Consular Conventions are so far from uniform in dealing with their legal position. Rostworowski[2] shows that in the Conventions to which France is a party the greatest diversity prevails. Certain of them (*e.g.* convention of June 8, 1855, with Holland, sec. 12) expressly

[1] Hall, *Int. Law*, 7th ed., p. 212.

[2] *Annales de l'école libre des sciences politique*, Vol. 10 (1895), p. 33.

place passengers under Consular jurisdiction. Others (*e. g.* Convention with Peru of March 9, 1861, sec. 34) make their subjection conditional on the passenger belonging by nationality to the flag state. In others, again, the exemption from the local jurisdiction is so worded as to make the inclusion of passengers open to dispute. For example, sec. 8 of the Convention of December 10, 1860, with Brazil speaks of "the captain, officers, and persons borne under whatever name on the ship's articles," a phrase which, according to this author, includes passengers, since although strictly forming no part of the crew, they are entered by name on a passenger list which is annexed to the articles. Liszt [1] is of the contrary opinion. Certain Conventions with important powers [2] are silent on the subject, and apparently exclude passengers from the Consul's authority.

Mention has already been made in connection with exempted mail steamers of the provision in Sec. 5 of the Anglo-French Mail Ships Convention of 1890, that "passengers on ships to which the Convention applies, who may not desire to go on shore during the vessel's stay in a port of either state, cannot be on any account taken from on board."

Apart from convention, it is recognised universally that no right of asylum on merchantmen exists.

Stating his own opinion, Moore [3] says :—

"Apart from acts affecting their internal order and discipline and not disturbing the peace of the port, merchant vessels as a rule enjoy no exemption from the local jurisdiction. It is therefore generally laid down that they cannot grant asylum. It has been suggested by Ortolan [4] that a fugitive offender who, merely as a passenger in transit from one country to another, enters the territorial limits of a third state, should not be seized in the latter country. The exception, (says Moore,) would seem to be strictly confined to the circumstances stated and not to have been intended to apply to a person merely because he is in transit in the physical sense, as where he enters another port of the country in which he embarked."

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[1] *Das Völkerrecht*, 6th ed. (1910), p. 87.

[2] Consular Convention between U.S.A. and France, February 23, 1853, and between U.S.A. and Germany, December 11, 1871. (See *Compilation of Treaties in Force*, 1904, pp. 249, 279.)

[3] 2 Moore, 855.

[4] Ortolan : *Diplomatie de la Mer*, 4th ed., 569.

He goes on to cite the opinion of Mr. Fish, Secretary of State, in 1876, advising the U.S. Minister to Hayti on the action to be taken in cases like that of attempted arrest by the Haytian Government of refugee passengers on French mail steamers whom the French minister refused to give up.

"According to American principles of law, a merchant-vessel in port is under the authority of the local laws and officials, and neither a Consulate nor a Legation would have anything to say in regard to a supposed criminal being taken from a ship." [1]

As to the practice which has actually been followed in cases of the arrest of offenders on American vessels in Spanish American ports, Mr. Blaine's dispatch of November 18, 1890, in the Barrundia case,[2] deserves quotation, though his statement of the law is open to criticism.

"The records," he said, "showed several recent instances. In these cases the Consular or Diplomatic Officer has invariably been applied to for his consent, and proof has been furnished in authentic legal form of the crime alleged. Where there has been ground for the suspicion that the application bore a political complexion, ample proof has been adduced that the offences charged were ordinary in their character. This fact has been made the basis of the request for the consent of the foreign representative to the arrest, and the Department is not informed of any case in which the arrest has been made when the representative of the U.S. withheld his consent or the demand wore a political aspect."

§ 6

The Recent Controversies

(a) *With Germany*

In the case of the *Ernst Woermann* in 1905, a provisional warrant under the Fugitive Offenders Act was obtained at Bow Street at the instance of the Attorney-General of Cape Colony for the arrest of Elias Goldstein, a fugitive offender from Cape Colony, who was a passenger on this German vessel bound from Cape Town to Hamburg. It was proposed to execute the warrant when the vessel put into Southampton Water, where she was shortly expected. For lack of time, the proposal to arrest was not notified to the German Ambassador, though the metropolitan

[1] 2 Moore, p. 857. [2] U.S. For. Rel., 1890, p. 123; 2 Moore, p. 861.

police officer, before proceeding on board the ship as soon as she anchored off Netley on December 16, called on the German Consul at Southampton and obtained a letter of introduction to the captain. On the ground, however, that Goldstein was a German subject on a ship of the same nationality, the captain refused to permit the arrest of the man, who therefore remained on board, and proceeded with the ship to Hamburg. Application to the German Government for the arrest of Goldstein in Germany for the purpose of extradition to Cape Colony was without result; and in reply to a British representation that the action of the captain in refusing to surrender Goldstein when the vessel was within British waters was irregular, the German Government took the line that the consent of the country to which the ship belongs is necessary in such a case, since if this consent were not asked for

"it might easily lead to evasion of the limitations of extradition which have been laid down after careful consideration in the Extradition Treaties. . . . The Imperial Government would presumably have given their consent to the arrest in the present case, if it had been asked for, but they cannot disapprove of the conduct of the captain in objecting to Goldstein's arrest for the purpose of his extradition to Cape Colony, as this consent of the Imperial Government had not been obtained."

The short answer to this contention was that no question of extradition was involved, arrest under the Fugitive Offenders Act in one part of H.M. dominions for return to another being a proceeding wholly different from extradition.

In the case of the *Bürgermeister*, in 1909, the circumstances of which were practically identical with those of the previous case, the master again refused to permit the arrest of the person sought for, who could not be persuaded to leave the ship. In the subsequent correspondence the Imperial Government justified the conduct of the master by laying stress, *inter alia*, on the fact that the police officer had no regular warrant in his possession, and they reverted to the argument already advanced in the previous case, that their consent was necessary because the case was in the nature of extradition to a third state, instancing in support of this contention that when a fugitive criminal was extradited from Canada to Germany, and was disembarked to cross this country *in transitu*, the Imperial Government was

required to commence extradition proceedings *de novo* to some extent in England.[1] On the general question of the right to effect arrests on German vessels, the Government observed that its attitude had been regulated in the sense of requiring the consent of the flag state by Convention with the United States of 1871, and that it was not prepared to adopt a different attitude in a question with Great Britain, with which, admittedly, no Convention existed. Reference was made with approval to the principles formulated by the Avis du Conseil de l'État, of November 20, 1806, and adopted in the said Convention with the United States.

The German Government expressly stated that they made no claim to exterritoriality for their merchant vessels temporarily lying in foreign ports, and disclaimed any intention to assist such vessels in becoming asylums for fugitive offenders. They confined their attention to the attitude to be adopted in a question as to the arrest of persons already on board a foreign vessel when it puts into harbour for a temporary stay. It was not maintained that even in this limited case the foreign ship was freed from the jurisdiction of the littoral state, but it was contended, and with vigour, that this jurisdiction would only be exercised with certain limitations which had been formulated in the decision of the French Conseil d'État of November 20, 1806, and had been "adopted in the sense of this decision not only

[1] The reason is that Canada has special Extradition Statutes (of 1877 and 1889, replaced by a statute of 1906, R.S. c. 142). By Order in Council of July 6, 1907, the operation of the Imperial Extradition Acts of 1870 and 1906 was suspended in Canada so long as the Canadian Statute remains in force. A similar suspension of the Act of 1870 was effected by Order in Council of December 28, 1882. The Canadian Statute differs in wording from the Imperial Statute. The Minister of Justice is authorised to order surrender to a person who is in his opinion duly authorised to receive the prisoner on behalf of the foreign state, and the Canadian official may be authorised to deliver the fugitive (*i. e.* in Canada), but it is for the person authorised to receive him on behalf of the foreign state to hold him in custody, and convey him within the jurisdiction of the state. It is clear that the Canadian Government has no power to authorise a Canadian official to convey a prisoner across the seas or through the territory of Great Britain or any other country. But it is only in the case of prisoners *in transitu* from Canada that the formality of fresh proceedings in England is necessary. It is not required in the case of prisoners surrendered by other British Colonies.

by most of the European States but the United States of America." Reference was then made to Art. 13 of the Consular Convention of December 11, 1871, between Germany and the United States, providing that the maintenance of internal order on board merchant ships of one party lying in the waters of the other is exclusively in charge of the Consuls of the former party and that the Consuls must determine any differences which may arise on these ships without, as a rule, the interference of any court or authority of the country. Reference was further made to Art. 12 (2) of this Convention providing that judicial authorities and customs officials may in no case proceed to the examination or search of merchant vessels without having given *previous notice* to the Consul. As these were the principles which determined the relations between the Empire and the United States, the Imperial Government was of opinion that the attitude of the United States in the case of the *Costa Rica* in Honduranean waters,[1] which had been cited by the British Government, " must be judged on its merits." The Imperial Government was not now prepared to come to an understanding with Great Britain similar to that in the Convention with the United States, as an earlier offer in this sense had been declined by the British Government. Finally they adhered to the position taken up in an earlier stage of the present controversy, viz.:—

" that they could not consent in principle that the sovereign rights of a state over foreign ships of commerce which are temporarily in the territorial waters of that state being so far extended that its officials may, without the consent of the state whose flag the vessel flies, take any coercive measures on those ships."

The German argumnte, it will be observed, treats the right of the territorial authorities to arrest a passenger on a sojourning foreign merchantman as a *casus improvisus*, and contends that regard for the dignity of the flag-state requires its consent as a condition precedent to the exercise of the right. No attempt is made to support this contention by any acknowledged principle of international law, indeed the disavowal of any claim to exterritoriality for foreign merchantmen implies recognition of

[1] *Infra*, p. 90.

the territorial sovereignty from which the right to arrest flows as a natural consequence.

The argument from the decision of the Conseil d'État and the Consular Convention with the United States adopting its principles was singularly irrelevant to the question in hand.

It is perhaps pedantic to point out that the decision was confined to the question of criminal territorial jurisdiction over crimes and offences committed on foreign vessels by members of the crew, but it is far from pedantic to assert that not even by implication does the decision claim that the consent of the flag state is required for the exercise of the local jurisdiction in cases not expressly excluded by the decision itself. Indeed the admission that the local authorities may intervene even in matters of internal discipline "where their assistance has been invoked or the peace of the port disturbed," so far from supporting the modern German claim, is so expressed as necessarily to make the local authorities the ultimate judge of whether their competence is excluded or not.

Even weaker is the argument from the existence and terms of the Convention with America. What Art. 12 (2) prescribes as a condition precedent to investigation or search by the local judicial or customs authorities is not the permission of the flag state (which could only be obtained through the diplomatic channel) but the very different thing: preliminary notice to a subordinate official, the Consul.[1] And apart from this techni-

[1] The following document of March 6, 1914, shows that in the Port of Hamburg notification to the Consul was not made except where provided for by treaty or reciprocity was assured. The Instructions did not apply to British ships, though under sec. 6 subsequent intimation was made to the British Consul of the result of official acts by the local authority on British ships.

COPY

ANNEXATION TO No. 1829.

Police Board of Hamburg. Division 11 (Criminal Police).

Hamburg, March 6, 1914.

INSTRUCTIONS,

Respecting official acts on board foreign merchantmen.

Sec. 17 of The Service Instructions reads as follows :—

1. Merchant vessels on the high seas are subject to the exclusive jurisdiction of the flag state, and are immune from all foreign jurisdiction and police authority. (For exception see par. 4 (*e*).)

cality, the mere existence of a Convention containing these specific provisions in itself goes to show that the Convention was intended

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Foreign merchantmen are subject to the local jurisdiction while in the port of Hamburg, except in so far as limitations are established by treaty.

2. Where no treaties exist (*Belgium, Denmark, Great Britain, Guatamala, Netherlands, Norway, Sweden*) the authority of the criminal police on foreign is the same as on German merchant vessels.

   No disputes are to be referred to the Consul except those relating to wages and the performance of other contractual engagements, and matters concerning discipline. (Compare the German Seaman's Ordinance applying only to German ships, and in particular sub-secs. 84–92, 96–108, 112–114, 116.)

3. With a number of states (*Bulgaria, France, Greece, Honduras, Italy, Japan, Mexico, Nicaragua, Portugal, Russia, Spain, United States of America*) treaties have been concluded to the following effect :—

   Consuls have sole jurisdiction in maintaining internal order on board merchant vessels of the state which they represent; they have sole competence, therefore, to settle disputes between members of the ship's company, particularly such as relate to wages and the performance of mutual obligations.

   The local authorities are not entitled to intervene in disturbances on board such vessels where they are of a nature to disturb peace or good order in the port or ashore, or where a German or a person not belonging to the ship's company is involved.

   In all other cases the local authorities shall confine their action to giving assistance to the Consul on his request. In particular it is their duty, at the Consul's request, to find and arrest deserters from the ship's company, and return them on board, unless they possess German nationality, or have been guilty of an offence in German territory.[1]

   Consequently the police authorities may go on board merchant vessels of the said Powers in the absence of the Consul, i. e. *ex officio* or after notification—

   (*a*) in the exercise of the power of harbour police (inspection of passengers);

   (*b*) in prosecution of offences on board disturbing the peace or good order ashore or in the port (*e. g.* mutiny of the crew, arson, murder, homicide, grievous assault).

   Where the assistance of the criminal police has been invoked by the Captain or his representative, the police shall act on the rule that they have competence to prosecute—

   (*c*) where the punishable act has been committed ashore, *e. g.* receiving goods stolen on board;

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[1] Conventions for the surrender of deserting seamen have been concluded with all Maritime Powers.

to modify the ordinary rules of international law, which, apart from the Convention, would have been applicable. Students of international law are too familiar with Hall's well-known argument on this point in the value of treaties as evidence of the law of nations to require that it should be further elaborated. Britain, which has no similar Convention with Germany, clearly cannot be bound by a Convention to which she is not a party.

(*d*) where a German national or a person not belonging to the ship's company is involved as a suspected or an injured person;

[*Note.*—Disturbances on board, solely directed against the discipline of the ship, *e. g.* insubordination to the ship's officers, fighting among the crew, drunkenness, etc., do not justify intervention, even where the suspected or injured person is a German.]

(*e*) in prosecution of the following acts committed by Germans or foreigners on board or abroad: high treason against the German Empire or a Federal State, currency crimes or offences committed by a German official in the course of his duty.

(German Criminal Code, sec. 4 (1).)

Where the criminal police is not entitled to intervene, applications for their assistance shall be referred to the Consul.

4. Except where delay is dangerous, no steps shall be taken on board a foreign merchantman without orders from the officer in charge of the police station. The officer shall notify the captain of the official act in contemplation.

Notification to the Consul

5. By virtue of treaty or where reciprocity is assured, Consuls, with the exception of those of *Great Britain*, *Venezuela*, *San Domingo*, *Haiti* and *Cuba*, have the right to be present at any official act on board a merchant vessel belonging to their state (search or detention of the vessel, apprehension, taking into preliminary custody, oral examination). Notification, with a statement of the hour, shall be made to the Consul, and he shall be invited to be present. If neither the Consul nor his authorised deputy appears, the official act may take place in his absence. Where there is danger in delay, preliminary notification may be dispensed with, but the Consul must be notified as soon as possible after completion of the official act.

The above provisions apply also where members of the ship's company are to be examined before the local authorities on shore.

Notifications intended for the Consul shall be signed by the Officer in charge of the Station on behalf of the Divisional Superintendent.

6. Reports shall be marked "Consular matter."

So far as necessary the Divisional Superintendent shall acquaint the Consul with the result of the official acts, even in cases excepted under par. 5.

(b) *With France.*

"*Amiral Hamelin*" *Case*, 1911.—This case raised very sharply with France the question of the jurisdiction of the local authorities over offences committed by a member of the crew on a foreign vessel lying in a British port, and is valuable for an official French statement of the reasons underlying the Avis du Conseil de l'État of November 20, 1806.

On November 20, 1911, William Savage, a coloured fireman of British nationality serving on board the French steamer *Amiral Hamelin*, which was lying in the harbour of Bathurst, British Gambia, was seriously assaulted on board the ship by three French members of the ship's company. As soon as he was able to go ashore, he went to the Government Hospital for treatment of his injuries, and on November 22 swore an information and complaint against his three assailants before the Chief Magistrate of the Colony, who thereupon issued a warrant for their arrest. On the local police proceeding to the ship and presenting the warrant, the master refused to surrender the culprits on the ground that the fight during which the complainant's injury was received took place on board among men of the crew, and in no way caused disturbances in the harbour. The same attitude was taken up by the French Consular officer when asked by the Acting Governor of the Colony to co-operate in effecting the arrest. The master's refusal was founded on the French Maritime Code, which in the circumstances as stated by him excluded the intervention of the local authorities. In the interest of trade, and to avoid probable litigation in the future, the Acting-Governor allowed the vessel to proceed, and reported the occurrence to the Foreign Office, with the suggestion that representations should be made to the French Government with the object of obtaining a suitable *amende* for the master's defiance of lawful authority. Attention was drawn to the fact that the failure of a British native to obtain redress in a British Court for alleged ill-treatment on a foreign vessel was calculated to have an unfortunate effect, in the eyes of natives, on British prestige.

In reply to British representations in this sense, the French

Government, while disputing, on the authority of a French enquiry, certain of the facts stated in the British case, found themselves unable to disapprove of the master's conduct, in justification of which they advanced various arguments, *inter alia*, that the warrant had been issued without preliminary examination of the witnesses, at which the master or Consul might have been present, and that according to a usage followed by many countries including France, the jurisdiction of the territorial authorities over a foreign ship calling at a port is only applicable to a case in which members of the ship's company are solely involved on board the ship if the peace of the port be disturbed. The French Government, in enclosing a copy of the Avis du Conseil de l'État of November 20, 1806, declared their readiness to enter into negotiations with His Majesty's Government in regard to determining from an international point of view the competence of the territorial authorities in respect of offences committed on board a foreign ship lying in port, and suggested that the proposed agreement should follow the lines of the Avis du Conseil de l'État. A copy of a French Ordinance of October 25, 1833, in the same sense was also enclosed.

The following points emerge from the French notes:—

1. The Government appears to contend, in opposition to the opinion of the Cour de Cassation in 1859, that the disturbance of the port must be actual disturbance amounting to breach of the peace, not moral disturbance emerging at a later date. This appears from the stress laid on the interval of two days between the occurrence and the issue of the warrant of arrest.

2. The fact that appeal was made to the local authorities was wholly ignored. If pressed on this point the Government would probably contend that it was only the captain or Consul by whom local aid could be invoked within the meaning of the Avis. The seaman, by signing French articles, was apparently precluded from lodging complaints with the authorities ashore.

3. On the merits of the formula of 1806, the Government contends that it meets the ends of justice by ensuring the due punishment of offences by the flag state, and that in certain extreme cases which it figures (*e. g.* crime committed on a foreign

man-of-war when on the point of leaving territorial waters) no other system would ensure punishment. This argument omits to notice that the British system fully recognises that alongside of the complete territorial jurisdiction a concurrent jurisdiction of the flag state may exist, which in the case figured would have had full cognisance of the offence.

4. As a further merit of the French system it was pointed out that exclusion of crimes and offences committed on board from the local jurisdiction prevents the detention of the vessel by judicial proceedings—a result wholly advantageous to shipping.

§ 7

International Precedents.—As regards state practice in questions not covered by express treaty, the general principle that merchantmen have no legal right to immunity from the local jurisdiction of a foreign power into whose ports or harbours they enter is well established and recognised. The conventional limitations on the exercise of the local jurisdiction established by treaty depend on policy rather than on legal right, and cannot, of course, be pleaded against a state which is not a party to them. Moreover, the Conventions seldom deal either with the legal position of passengers or with the territorial state's general right to effect arrests on the foreign vessel.

The international precedents show that where the right of arrest was exercised under due process of law, and in one case without such process, against a national of the arresting country on board a foreign vessel, no effective protest has been made by the flag state. They also show a tendency on the part of the territorial authorities to acquaint the Consul of the flag state with their intention to effect arrest, and in some cases even to request his co-operation. Such notification would ordinarily be made as a matter of international courtesy, but it is not conceived how a flag state could demand as a right not merely notice to its Consul, but a request for its own consent as a condition precedent to the exercise of a right which, in the absence of generally recognised immunities over merchantmen, flows as a

natural result from the principle of sovereignty. Perels [1] expressly states that if the police or judicial authorities have occasion to perform an official duty on board a foreign merchantman, it depends on circumstances and their own discretion whether they will give the resident Consul of the flag state an opportunity of being present. So far as I have been able to ascertain none of the Consular Conventions provides for more than notice to the Consul, *e.g.* Consular Convention between the United States and the German Empire, December 11, 1871, Art. 12 (2).

In the days of slavery conflicts of law were frequently caused by the entry of a vessel carrying slaves into the ports of a country in which the status of slavery was illegal. While it was well recognised that in the converse case a slave from the riparian state had no right of asylum on a merchantman belonging to a state in which slavery was unknown, and could be forcibly removed if his surrender were refused, it is also established by the Arbitral Award of the Emperor of Russia, May 17, 1875, in the case of the *Marie Luz*,[2] that a state in which slavery was expressly

[1] *Loc. cit.*, p. 65.

[2] The *Marie Luz*, a Peruvian vessel, carrying coolies from Macao for Peru, put into the harbour of Yokohama under stress of weather. One of them who had succeeded in escaping and in taking refuge on H.M.S. *Iron Duke*, was handed over to the Japanese authorities. In consequence of this and of the captain of the *Marie Luz* having been convicted of ill-treatment of his passengers, the Japanese authorities ordered the latter to be disembarked, and invited the Japanese Courts to pronounce on the validity of the contracts of carriage entered into in Macao. The contracts were declared to be void, and the coolies were left at liberty to continue their voyage or not at their pleasure. As they chose the latter alternative, the Japanese authorities at their own expense repatriated them to Shanghai. The Court held *inter alia* that the status which awaited the passengers was that of slavery, whatever the name by which it was called; this status conflicts natural justice so that its existence could only be tolerated in virtue of a special statute which, however, could not claim recognition on the part of other foreign states. All contracts, moreover, were in violation of the public law of Japan, which did not tolerate slavery, and in these circumstances in respect of their validity the *lex loci contractus* must yield to the *lex fori*. The action of the Japanese authorities led to conflict with the Peruvian Government, which was settled by the arbitral award of the Emperor of Russia on May 29, 1875, in favour of Japan, the arbitrator finding that the Japanese Government had acted in good faith in virtue of its own laws and customs, without infringing the general rules of international law or the stipulations of particular treaties. *Annuaire de l'Institut de Droit International*, 1877, p. 353.)

forbidden was entitled to enforce its prohibition and set free slaves carried on a foreign vessel within the limits of its territory.

The case of the *Creole*, 1853,[1] may be contrasted with the latter case, though it is possibly of less authority as being the award of a national of the United States, a party to the dispute. Damages were awarded to the owners of an American vessel transporting slaves from one American port to another who had been liberated by the British authorities at Nassau, into which port the vessel had been forced as the result of murderous mutiny.

The complete control exercised by the local authority over a foreign ship and her crew in a harbour is strikingly illustrated by the converse case mentioned by Sir Travers Twiss, *Law of Nations*, p. 273, that when a British ship entered a port of South Carolina, where slavery was still maintained, there being a local law forbidding free negroes to be abroad in the city, if there were any free negroes among her sailors, though British subjects, they were taken from the ship by officers of the port and locked up until the vessel cleared outwards, when they were returned. That the intervention of the local authorities effected no permanent alteration in the status of the negroes makes no difference to the general principle.

On the right of arrest on a foreign ship the international incidents most in point appear to be those relating to the alleged right of asylum on merchantmen. It must not be forgotten, however, that four of the cases to be cited concerned a national of the arresting country.

The first of these is Sotelo's case (1840),[2] in which the French packet-boat *L'Ocean*, on one of her periodical voyages, received on board at her anchorage at Valencia, without knowledge of his personality, M. Sotelo, a Spanish ex-Minister of Marine, who was under prosecution for political offences. The vessel in due course arrived at Alicante, where M. Sotelo was recognised, seized and taken ashore and imprisoned in spite of the protests

[1] 2 Moore, *Digest of International Law*, pp. 350–61, and Stowell & Munro's *International Cases* (1917), I, p. 248. Scott's *Cases*, p. 252.

[2] 1 Calvo, p. 569.

of the captain of *L'Ocean*. The subsequent proceedings are thus described in Moore's *Digest of International Law*, Vol. II., p. 856:—

"Diplomatic communications on the subject which were exchanged between the Governments of France and Spain established it in the clearest manner that the conduct of the authorities at Alicante was above reproach; that no injury was done to the flag, since the acts in question pertained to an ordinary merchant ship and to a high measure of police executed inside the port; that M. Sotelo, surreptitiously embarked at Valencia, a Spanish port, could have been regularly seized and arrested on *L'Ocean* at another port of the same country; and, finally, that the fact that she had been on the high seas a certain time before entering Alicante could not alter the nature of the act done at the place of departure, and proved at the place of arrival, under the dominion of the same laws and the same territorial legislation."

To the same effect was the opinion of Lord Aberdeen, as appears from the following:—

"I am directed by Lord Aberdeen to acquaint you, for the information of the Lords Commissioners of the Admiralty, that there is no stipulation in the existing treaties between this country and Spain which can be deemed sufficient to debar the Spanish Government from exercising the right which, in his Lordship's opinion, appertains to that Government, of claiming its own subjects when they may be found in a Spanish port as passengers on board vessels hired to convey the mails between this country and the peninsula."

(Viscount Canning to the Secretary of the Admiralty, March 20, 1844. Report of the Commission on Fugitive Slaves, p. 154.)

Lord Aberdeen's opinion, it will be observed, was confined to the case where the individual arrested was a national of the arresting country.

Several more recent cases have occurred with regard to asylum sought by political refugees from Central America on board United States merchant vessels.[1]

Thus in 1884 the case of José Dolores Gomez elicited an opinion from Mr. Bayard, Secretary of State. Mr. Gomez, who was said to be a political refugee from Nicaragua, voluntarily took passage at San José de Guatamala for Punta Arenas, Costa Rica, on the Pacific mail steamship *Honduras* with the knowledge that the vessel would enter *en route* the port of San Juan del Sur, Nicaragua. On learning of this fact the Government of Nicaragua ordered the Commandant of the port of San Juan del Sur to arrest Gomez upon the arrival of the

[1] See Scott's *Cases on International Law* (1906), p. 273 *n.*

Honduras at that port. The Minister of Foreign Affairs of Nicaragua informed Mr. Leavitt, the United States Consul at Managua, of the action of the Government by telegram, and suggested that the Consul should recommend the captain of the *Honduras* to support the Commandant of the port, "as there is no ground on the part of the captain to hinder the execution of the Government order." Before the Consul had an opportunity of acting on this request, he received instructions by telegram from the United States Minister to Nicaragua which caused him to decline the request on the ground that the United States Government never had consented, and never would consent, to the arrest and removal from an American vessel in a foreign port of any passenger in transit, much less if the offence was political.

When the Government authorities at San Juan del Sur, upon the arrival of the *Honduras*, requested the captain to deliver up Mr. Gomez, he declined to do so, and set sail without proper clearance papers, for which offence he was tried in absence by the Nicaraguan Government and found guilty and sentenced to a punishment which, the United States Minister believed, would be executed against him on his return to Nicaraguan jurisdiction.

The State Department, being requested for instructions in these circumstances, laid down—

"It may be safely affirmed that when a merchant vessel of one country visits the ports of another for the purpose of trade it owes temporary allegiance, and is amenable to, the jurisdiction of that country, and is subject to the laws which govern the port it visits so long as it remains, unless it is otherwise provided by treaty.

"Any exemption or immunity from local jurisdiction must be derived from the consent of that country. No such exemption is made in the treaty of navigation and commerce concluded between this country and Nicaragua on June 21, 1867." [1]

As Mr. Coudert of the New York Bar points out in an adverse criticism of this ruling (Le droit de refuge à bord d'un navire étranger, 23 *Journal de Droit International privé*, p. 780), Mr. Bayard was called to deal with a merely hypothetical case which might be covered by a general statement of the law. No American vessel had in fact been forcibly entered, no passenger had been arrested, and no affront offered to the American

[1] Bayard to Hall, March 12, 1884, *U. S. Foreign Relations*, 1885, p. 82.

flag. Whether Mr. Bayard's opinion would have been the same had the suggested events occurred, Mr. Coudert ventured to doubt. He himself argues that the treaty of commerce and navigation was intended to assure, not to restrict, the rights of the nationals of the respective countries, and that it left the right of asylum untouched. He approves the action of the United States Minister, which he finds to be supported by that of Mr. Secretary Blaine in the subsequent case of Barrundia in 1890,[1] where all the events suggested in the former one actually occurred, with a result fatal to the refugee.

In the subsequent case of Barrundia in 1890 the United States set up a different rule, which, however, has not been followed.

General Barrundia was a political refugee from Guatamala, who took passage at a Mexican port on the Pacific Mail Steamship *Acaculpo* (American) for Salvador. The steamer was to call on the way at several ports of Guatamala, and on learning of the movements of Barrundia, the Government of Guatamala proposed to arrest him, and for this purpose informed the United States Minister, Mr. Mizner, basing their right to arrest on the state of war then existing. That the proposed arrest was legal was the opinion of Mr. Mizner and the American Consul-General Hosmer, and they so advised the captain of the *Acapulco* and the authorities of Guatamala. In the attempt to arrest Barrundia on board the steamship he resisted and was killed. For his part in the affair Mr. Mizner was severely censured and recalled from his post. Commander Reiter of the United States ship of war *Ranger*, who was present in the port at the time, was also sent into disgrace for not interfering to prevent the arrest.

Mr. Blaine's dispatch to Mr. Mizner of November 18, 1890, reviewing the facts and stating the law, has not approved itself to the American experts,[2] with the exception of Mr. Coudert.

[1] Scott, *loc. cit.*, p. 275 *n.*

[2] Scott, *loc. cit.* "It is hardly too much to say that there is no foundation in international law for the position of the United States in this affair. The only possible excuse for it is the assertion that the Spanish-American states do not possess all the rights of sovereign states and that there should be adopted an exceptional rule in their case, in regard to asylum on merchant ships, as there is in the case of legations."

Nor does it appear to have been followed as a precedent by the Department of State in subsequent cases. For example, the case of the *Costa Rica* in 1893 led the Department of State to an express recognition of the right of the local authorities under due process of law to arrest a person who is charged with crime and is a passenger on an American vessel.

The United States Pacific Mail Steamship Company's vessel the *Costa Rica* was fired on by the Honduranean authorities at Amapala because the master had refused to surrender a Dr. Bonilla, who had been sentenced by the courts of the Republic, and had weighed anchor without complying with the request of the Honduranean authorities. On the demand of the United States, the firing on the ship was disavowed, but with regard to the general principle of local jurisdiction over foreign merchantmen the United States Department of State laid down that—

"It is not practicable to lay down a general fixed principle applicable to the varying conditions in such cases. As a comprehensive principle it is well established in international law that a merchant vessel in a foreign port is within the local jurisdiction of the country with respect to offences or offenders against the laws thereof, and that an orderly demand for surrender of a person accused of crime by due process of law, with the exhibition of a warrant of arrest in the hands of the regularly accredited officers of law, may not be disregarded nor resisted by the master of the ship. On the same voyage when the Amapala incident occurred, Captain Dow appears to have acted on this principle in allowing the arrest at other ports, on proper judicial warrant, of two or three other passengers accused of crime. That the passengers may have come on board at the port where the demand is made or at another port of the same country is immaterial to the right of local jurisdiction.

"Arbitrary attempts to capture a passenger by force, without regular judicial process, in a port of call, may call for disavowal when, as in the present case at Amapala, the resort to violence endangers the lives of innocent men and the property of a friendly nation.

"The so-called doctrine of asylum having no recognised application to merchant vessels in port, it follows that a shipmaster can found no exercise of his discretion on the character of the offence charged. There can be no analogy to proceedings in extradition when he permits a passenger to be arrested by the arm of the law. He is not competent to determine whether the offence is one justifying surrender or whether the evidence in the case is sufficient to warrant arrest and committment for trial, or to impose conditions on the arrest. His function is passive merely, being confined to permitting the regular agents of the law, on exhibition of lawful warrant, to make the arrest. The diplomatic and Consular representatives of the United States in the country making the demand are as incompetent to order surrender by way of quasi-extradition as the shipmaster is actively to deliver the accused."—*U.S. Foreign Relations*, 1894, pp. 296–7.

Summary.—If the merchant ship is in law subject to the local jurisdiction, there is no foundation in principle for obtaining the consent of the flag-state to a proposed arrest or of constituting its representative the judge whether the offence for which surrender is demanded is political or not. The practice followed by the South American states, which is doubtless attributable to their desire to avoid the possibility of conflict with a powerful neighbour, cannot be commended for general adoption. On the other hand, it is only reasonable for the local authorities to give notice to the representative of the flag-state of intention to effect an arrest and, if possible, to state the hour of the proposed visit, so that the Consul, if he thinks fit, may have an opportunity of being present to see that the warrant is duly authorised by law.

To do so would merely apply to all classes of merchantmen, a procedure already prescribed for arrests on exempted mail ships in the British Empire by the Mails Ships Act 1891.

More than preliminary notice is not required under any of the existing Consular Conventions now in force.

In view of the adherence of Great Britain, and where unaffected by treaty of the United States to the traditional doctrine of full sovereignty and control over foreign merchantmen, it is submitted—

(1) That the French view prescribing certain limitations cannot claim to have attained compulsory authority, notwithstanding extensive adoption by national legislation of several countries and numerous Consular Conventions (to none of which Britain is a party).

(2) That there is thus no generally recognised rule as to how far the jurisdiction of the territorial authority over foreign merchantmen extends, either in respect of civil or criminal jurisdiction.

(3) That in view of this conflict an international agreement is eminently desirable if this is possible without altering the law of criminal jurisdiction in the British Empire and United States.

(4) That in view of the vagueness of the expressions "unless their assistance is invoked," or "crimes and offences disturbing the peace of the port," it is desirable to specify, as regards the

former phrase, the person, whether master, author, or victim, of the offence whose appeal shall exclude the Consular jurisdiction, and as to the latter, the crimes and offences which by their gravity concern the territorial state, rather than to employ a general and contentious descriptive phrase. In the event of it being thought right to retain general words of exclusion, it is suggested that their interpretation should be expressly entrusted to the competent authorities of the territorial state, as in the Consular Convention between Holland and Austria-Hungary of July 28, 1912, sec. 18, which provides—

"The local authorities, however, shall have jurisdiction in the case of the occurrence on board merchant vessels of one of the contracting parties in the territorial waters of the other of disorders *which the competent authorities of the place shall determine to be of a nature to disturb the peace or order of these waters or on land.*"

(5) That in respect of the right to arrest, the model of the Anglo-French Mail Ships Convention of 1890 should be followed in excluding all arbitrary arrests and in permitting all arrests authorised by warrant under the local law, subject to previous notice to the Consular representative of the flag-state at the port, if there be one.

Appendix

The trend of scientific opinion is shown by the development in the Resolutions of the Institute of International Law.

The Paris Resolutions of 1894 on territorial waters laid down in sec. 8 (as foundation of the right of hot pursuit) that "ships of all nationalities are subject to the jurisdiction of the littoral state by the simple fact that they are in territorial waters, unless they are only passing through them," and went on to formulate the conditions under which the right of hot pursuit might be exercised.

In 1898 the Institute adopted a series of resolutions on the legal regime of vessels (public and private) in foreign ports, which is no doubt founded on the principle above mentioned, but incorporates exceptions amounting to general adherence to the French system.

Nevertheless it sanctions the fundamental view held in

Britain as to the littoral state's territorial rights in its national waters (see Arts. 1 and 2, quoted *supra*, p. 63).[1]

The same general principle is repeated in sec. 29, providing

" merchantmen of all nationalities, by the mere fact of being in a port, or in a part of the sea to which the same regime applies, are subject to the local jurisdiction, without distinction in respect of facts occurring on board or ashore."

The French limitations on the local jurisdiction are incorporated in Art. 30—

" Offences committed on merchant vessels in the open sea are not subject to the jurisdiction of the authorities of a foreign port of call; but in case of flight, where the vessel puts to sea in order to withdraw her crew from legal action taken against them in respect of acts committed in port amounting only to breaches of discipline or professional duty of seamen, they are subject to the exclusive jurisdiction of the flag-state. The local authority ought to abstain from intervention, unless its assistance has been regularly requested, or unless the act is of a nature to disturb the peace of the port. Even in the latter case, the local authority has no jurisdiction unless the act constitutes a common law offence as well as a breach of discipline."

Apart from the right of the local authority to arrest, after notice to the Consul, a fugitive offender against the local law, even if a national of the flag-state, who has taken refuge on board, and whose surrender is asked and refused (Art. 34), the only arrest contemplated by the Resolutions appears to be incidental to an offence committed on board which falls within the local jurisdiction. Notice to the Consul of the flag-state is recommended, but the validity of judicial steps taken on board shall not be invalidated by his absence from the proceedings (Art. 31).[2]

[1] So far as can be ascertained from the *Tableaux Générales* of the *Journal de droit international privé*, 1876–1908, the right to arrest a passenger on a foreign merchantman has not been raised in state practice. No reference, at any rate, is found in this index.

[2] Art. 31 : " When proceedings are instituted by the local authority against a member of the crew, immediate notice ought to be given to the Consul of the foreign country for the district in which the vessel lies.

" Whenever its competence is established, the local authority may go on board the vessel, and proceed to all enquiries, verifications of facts, preliminary proceedings and arrests, subject to conforming with the local law.

" If there is an agent of the flag-state in the neighbourhood, he ought to be notified in advance of the intended visit to the vessel, as well as of the hour at which it will be made, and be invited to be present, if the judge thinks fit, either personally or by duly authorised deputy, but the absence of the Consul or deputy shall have no effect whatever in invalidating the said judicial proceedings."

The full text of Arts. 25–37 regarding the status of merchant vessels in time of peace is appended.

§ 11. Marine Marchande [1]

"*Art.* 25.—Les navires de commerce étrangers dans un port y sont placés sous la protection de l'autorité territoriale. Ils sont soumis, en règle générale, et sauf les dérogations formelles consacrées par les articles suivants, aux lois de police et de surveillance, et à toutes les dispositions réglementaires en vigueur dans le port où ils sont recus.

"*Art.* 26.—Ils doivent acquitter les droits, taxes, redevances et contributions légalement réclamés, en se soumettant aux régles établies par la loi territoriale pour en assurer le recouvrement; sans que, pour l'accomplissement régulier et normal de ces formalités, les agents locaux aient à recourir à l'intervention des consuls ou autres agents de la nation à laquelle appartient le navire.

"Le capitaine, dans l'accomplissement des formalités qu'il est tenu de remplir, doit se faire assister par les agents commissionnés dans les pays où la loi en a institué à cet effet avec un droit exclusif.

"*Art.* 27.—Les consuls, vice-consuls et agents consulaires peuvent aller personnellement ou envoyer des délégués à bord des navires de leur nation, après qu'ils ont été admis en libre pratique, interroger le capitaine et l'équipage, examiner les papiers de bord, recevoir des déclarations sur leur voyage, leur papiers de bord, recevoir des déclarations sur leur voyage, leur destination et les incidents de la traversée, dresser les manifestes et faciliter les expéditions du navire; enfin, accompagner les hommes du bord devant les tribunaux et dans les bureaux de l'administration du pays, pour leur servir d'interprèts et d'agents dans les affaires qu'ils ont à suivre ou les demandes qu'ils ont à former; sauf dans les cas prévus par les lois commerciales du pays de stationnement, aux dispositions desquelles ils sont tenus de se soumettre rigoureusement, sans que la présente disposition puisse être considérée comme y portant la moindre dérogation.

"*Art.* 28.—Le régime auquel sont soumis les navires étrangers dans un port ouvert doit être le même en principe, et sauf les exceptions pouvant résulter des traités, pour tous les navires sans distinction de nationalité.

"*Art.* 29.—Les navires de toutes nationalités, par le fait seul qu'ils se trouvent dans un port ou une portion de la mer dépendant du même régime, sont soumis à la juridiction territoriale sans distinction, à raison des faits qui se sont produits à bord ou à terre.

"*Art.* 30.—Les faits délictueux commis sur un navire de commerce en pleine mer ne rentrent pas dans la compétence de l'autorité du port étranger où il aborde; mais, en cas de fuite du navire, pour soustraire des gens du bord aux actions dirigées contre eux à raison de faits commis dans un port, qui ne constituent que des infractions à la discipline et aux devoirs professionnels du marin,

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[1] Du régime légal des navires et de leurs équipages dans les ports étrangers.—Règlement voté par L'Institut de droit international, le 23 aout, 1898, au cours de sa session de La Haye.

ne relèvent que de la justice nationale du bord. L'autorité locale doit s'abstenir d'intervenir, à moins que son concours ne soit régulièrement réclamé ou que le fait ne soit de nature à troubler la tranquillité du port.

" Même, dans ce dernier cas, la juridiction locale ne peut devenir compétente que si le fait constitue, en même temps qu'une infraction disciplinaire, un délit de droit commun.

" *Art.* 31.—Lorsque des poursuites sont dirigées contre un homme du bord par l'autorité territoriale, avis doit en être immédiatement donné à l'autorité consulaire du pays étranger dans l'arrondissement de laquelle se trouve le navire.

" Dès que l'autorité locale est compétente, elle peut procéder sur le navire à toute investigation, constatation, instruction et arrestation, en se conformant aux prescriptions de la loi.

" S'il y a à proximité un agent de la nation à laquelle appartient le navire, il doit être averti à l'avance des descentes qui doivent avoir lieu à bord, avec indication de l'heure où elles se feront et invitation d'y assister, s'il le juge convenable, personnellement ou par un délégué mis à même de justifier de cette délégation, sans que son absence puisse apporter un empêchement quelconque aux opérations judiciaries.

" *Art.* 32.—Toutes les contestations entre les gens de l'équipage, ou entre eux et leur capitaine, ou entre les capitaines des divers bâtiments d'une même nation dans le même port, à raison de l'engagement des matelots ou de différends analogues, doivent être terminées en dehors de l'ingérence des autorités locales.

" Sont assimilées, pour l'application de cette règle, aux personnes appartenant à la nationalité du navire, les personnes engagées dans l'armement et portées sur le rôle d'équipage, quelle que soit leur véritable nationalité.

" *Art.* 33.—Les difficultés d'intérét civil entre des étrangers au navire et des capitaines ou gens de l'équipage, sont jugées d'après les règles de compétence de droit commun, sans être réservées exclusivement aux autorités du pavillon.

" Les contestations qui peuvent naître à l'occasion de règlement des frais et dépenses dans un port à la charge d'un navire étranger qui y est entré, soit volontairement, soit en relâche forcée, sont de la compétence du juge territorial et doivent être vidées par application des dispositions de sa loi.

" La compétence en matière de procès nés à la suite de l'abordage de deur navires étrangers est réglée conformement aux résolutions votées par l'Institut sur les conflits en matière d'abordage maritime.

" *Art.* 34.—Les capitaines de navires merchands stationnés dans un port étranger ne doivent embarquer aucun individu, fût-il un de leurs nationaux, qui, pour se soustraire aux conséquences de la violation des lois auxquelles il était soumis à raison de sa résidence, chercherait un refuge sur ces navires.

" Si une personne, se trouvant à bord dans cette situation, est réclamée par l'autorité territoriale, elle doit lui être remise; à défaut, cette autorité est en droit, après avis préalablement donné au consul, de faire procéder par ses agents à l'arrestation de cette personne sur le navire.

" *Art.* 35.—En ce qui concerne les déserteurs des navires marchands, on doit se conformer aux dispositions de l'art. 22.

" Toutefois, des déserteurs appartenant à la nationalite du pays où se trouve le navire ne doivent point être livrés aux autorités du bord par les autorités locales.

" *Art.* 36.—Les navires étrangers ancrés dans un port sont soumis à arrêt

et saisie par décision de justice pour fait de commerce et pour dettes, en exécution des lois territoriales.

" Toutefois il est à désirer que les lois prohibent la saisie d'un navire étranger ancré dans un port, lorsqu'il est prêt à faire voile, si ce n'est à raison de dettes contractées pour le voyage qu'il va faire ; et même, dans ce cas, le cautionnement de ces dettes doit permettre de lever la saisie.

" Les officiers ministériels et agents d'exécution sont autorisés à signifier toutes notifications et à faire tous actes d'exécution sur les navires étrangers, en se conformant aux lois de procédure applicables aux navires nationaux, et sans qu'il soit indispensable de recourir à l'intervention des consuls ou agents commerciaux, même présents, de là nation à laquelle appartient le navire.

" *Art.* 37.—Les officiers publics, officiers de l'état civil, notaires et autres, requis pour procéder à des actes de leurs fonctions ou de leur ministère sur des navires étrangers exercés dans un port, doivent s'y rendre ; et leurs actes, recus en la forme et dans les conditions réglementaires d'après la loi locale, ont le même effet et la même valeur que s'ils avaient été faits par ces officiers publics à terre dans l'étendue de leurs circonscriptions territoriales."

CHANGES IN THE ORGANISATION OF THE FOREIGN AND DIPLOMATIC SERVICE

In the Foreign Office List for 1857 appears for the first time the word Examination, this edition containing the "Regulations for the Examination, before the Civil Service Commissioners, as approved by the Earl of Clarendon, January 1, 1856." Under these regulations candidates for clerkships on the establishment of the Foreign Office were required to satisfy the Civil Service Commissioners—

(1) That they can write a good, bold hand, forming each letter distinctly.

(2) That they can write, quickly and correctly, English and French from dictation.

(3) That they understand French well, and that they can make an accurate and good translation of any French paper.

(4) That they can make a correct and clear précis or abstract of any set of papers placed in their hands.

"The limit of age for candidates is between eighteen years complete and twenty-four years complete, except in the case of those who may not reside with relatives, or have an established and respectable home in the metropolis or in its immediate neighbourhood. In this latter case, the minimum of age is twenty years complete."

The examination for unpaid Attachés was more elaborate: they were required to be able to translate English into French and to speak French "with tolerable ease and correctness." They had also to show that they could make an accurate and good translation into English of a paper written either in German, Latin, Spanish or Italian—the choice of the language being left

to the candidates; that they had a general knowledge of geography, and of modern history since the year 1789, and especially of the country to which they were about to proceed, as regards its internal constitution and its relation to other Powers. The limit of age for candidates was eighteen to twenty-three, both years inclusive, and there was naturally no reservation about the possession of a respectable home.

Before these regulations were issued the Foreign Office and Diplomatic Service had been recruited by patronage, modified, if at all, by a simple qualifying examination. In the Diplomatic Service appointments to the higher posts were often given to political supporters of the Government, or to other persons not already in the service; and these sometimes brought with them friends of their own as secretaries and attachés who subsequently remained in the service. An Ambassador, on arriving at his post, was wont to report that he had arrived safely "with his family," meaning his staff.

The period of service in subordinate posts was often very short; sometimes a young man spent a few years as précis-writer in the Foreign Office, or he was attached to a special mission for a few years, and then received an appointment as Minister on his own account. To quote at random from an old Service Book, we find that Mr. Woodbine Parish spends five months of 1815 attached to Lord Castlereagh's Mission to Paris, then six months employed in the Foreign Office, is for a short time attached to a Commission in Albania, spends six years as a clerk in the Foreign Office, after which, with seven years' service in all to his credit, he becomes Consul-General at Buenos Ayres. There he remains for nearly nine years, for over five of which he acts as *Chargé d'Affaires* and Plenipotentiary, and after a total service of under sixteen years he receives a Consular pension of £1000 a year.

Mr. James Morier is attached for a little over two years to Sir Harford Jones' Embassy to Persia, then for nearly seven years is Secretary of Embassy in Persia, at the end of which he receives a pension of £800 a year. Three years later he resumes service as Mehmandar to the Persian Ambassador,

after a year of which he becomes first Commissioner to Mexico, stays there eighteen months and retires in 1827 with a pension of £1100 a year.

Augustus Foster begins his career as Secretary of Legation to the U.S. of America, goes from there to Stockholm, and with six and a half years' service becomes Envoy Extraordinary and Minister Plenipotentiary to the U.S.A. Stratford Canning took three years only to become a Minister. Sir Brook Taylor, after seven years as Clerk in the Foreign Office and Private Secretary and précis-writer, becomes Minister Plenipotentiary to Cologne. Lord William Russell, after being attached for a year to Sir Robert Adair's Special Mission to Brussels, and another Special Mission to Portugal, becomes, with three years' service, Minister at Stuttgart.

In those days men seem to have passed freely from the Foreign Office to the Diplomatic Service, and sometimes to the Consular Service and back again, but they often spent long periods—eight, nine or ten years—in one post, and frequently most of their career in one country. In a big organised service these things cannot be done, as questions of regular promotion, health and so forth intervene, but the Diplomatic Service of the early nineteenth century had great advantages in the way of combining long experience with quick promotion.

After 1856, about fifty years elapsed without any change of principle in the manner of selection. The examination, especially for the Foreign Office, where vacancies were few, became stiffer and the grant of nominations more liberal, but there was a distinct practical limitation to a certain class of society. In the Diplomatic Service the limitation was strengthened by what has since come to be known as the "property qualification": in the earlier part of the century nominations were, as a matter of course, restricted to young men in good society, who had, more as a matter of course than now, means of their own; as time went on pay remained stationary; life abroad, from being incomparably cheaper than life in England, became in many places as expensive, if not more so; the possession of adequate private means became rarer among younger sons, and as it could no longer be taken as a matter of

course, an unwritten rule was laid down requiring candidates for the Diplomatic Service to be possessed of a private income of £400 a year. There was no such rule for the Foreign Office, but as there was frequent interchange between the Foreign Office and the Diplomatic Service, and as the absence of private means might debar a young man who entered the Foreign Office from going abroad, there was no great difference in practice between the candidates for the two branches of the service, and, in fact, they were continually and at all periods of their career transferred from one branch to the other.

The effect of the limitation imposed by the necessity for private means was not altogether bad. Roughly speaking it meant that the candidates were young men who preferred adventure, the opportunity of playing a part in international politics, the possibility of ultimate honours and influence, to the chance of making money. It did not mean that the service was a place for the "idle rich"; it was not a profession in which fools or knaves were gladly suffered, as the family life of our missions abroad was so intimate that the uncongenial would generally be squeezed out; the fool or the knave had no chance of being lost in the crowd; he attracted immediate attention. Moreover, so long as the numbers of the service remained small, each member had a reasonable chance of making some mark at a fairly early age, and this prospect attracted men of ability.

Gradually things changed. On the one hand the raising of the examination standard, on the other the great increase of business which entailed a quantity of routine work, such as copying, coding, filing of papers, and so forth, combined to produce a difficult situation. Young men who had taken a first-class at Oxford or Cambridge found themselves for years at a time occupied in drudgery of the dreariest kind, and though the hours of work were generally short, the prospect was dispiriting. Also the increase in the cost of living tempted young men, who were qualified to pass a stiff examination, to find a better market for their abilities. At this point a difference made itself felt between the Foreign Office and the Diplomatic Service. Vacancies

in the Foreign Office were few; pay, though small, began at once; expenses, even if the candidates had not an "established and respectable home" in London, were less than abroad, as there was no need to go much into society. Consequently the standard of ability among candidates for the Foreign Office became higher than among those for the Diplomatic Service.

Candidates for the Diplomatic Service included many men of ability, but there were others who, in order to pass the high standard of examination in foreign languages, had to leave school early, forgo the University, and spend some years abroad, when they sometimes learned little besides the actual amount of French and German required for the examination and neglected wider education.

In 1905 a very important step was taken by Lord Lansdowne in assimilating the examination for the Foreign Office and Diplomatic Service to that for the General Civil Service, and reducing the importance given to knowledge of languages. It became sufficient to offer French and German, and the character of the examination, combined with an alteration of the minimum age, which had meanwhile been raised from eighteen to nineteen, and which was now fixed at twenty-two, made it almost incumbent on candidates to go in for an honours course at the University, and thus raised the whole standard of the Diplomatic Service candidates.

Under Lord Grey a further step was taken which might have been expected by outside critics to mark a very striking change. The old system of nomination was abolished and a board of selection was set up, chosen from among the senior members of the service, to whom the Secretary of State entrusted the task of granting or refusing nominations. This meant the absolute end of patronage, but it did not bring about any change in the type of recruits, simply because the career continued to appeal mainly to the same classes. The number of candidates rejected by the board was extremely small, although any one who liked could apply for and receive permission to appear before it.

We may at this point consider further what the type of

candidate is to whom life in the Diplomatic Service is likely to appeal and who is himself likely to appeal to a board of selection. The first qualification, without which competition is useless, is a power of mastering foreign languages, which is not given to every one; this is not the most important qualification, but it may be put first because it is absolutely indispensable. This qualification, or rather the necessity for possessing a thorough knowledge of languages, rules out nearly all boys who have not been at the best public schools or been able to have the advantage of the best private teachers either at home or abroad. Next, the candidate must have some social qualities: if he wishes to go into the Diplomatic Service he must seem, to a board of selection, capable of adapting himself readily to most kinds of society, and must show signs of some power of self-assertion and management of men. The boy himself, or his parents, may not realise, or may be deceived as to, the possession or otherwise of this quality, but it is certainly one for which a Board of Selection is bound to look.

Now, if these qualities are admitted as of elementary necessity for the Diplomatic Service, it is suggested that an explanation is offered of the undoubted preponderance in the service of men from the great public schools. No preference is given or has been given by the Board to Eton in granting nominations (although the Royal Commission of 1913 refused to believe this), but the fact remains that the sort of boy who goes to Eton and other such schools is the sort of boy who combines the best chance of acquiring modern languages with the best chance of developing social gifts and self-possession at an early age. No one, of course, would assert that the great public schools twenty years ago were first-rate teachers of modern languages, but they were at least as good as most schools, and the parents of the boys, being those who for one reason or another were most ready to spend money on their sons' education, were most likely to send them, or take them, abroad in the holidays or University vacations, provide tutors and governesses, or send them to France and Germany and Italy or Spain after leaving school or University. The boys at some lesser public schools

may have been taught some French, but no mere school French was very likely to pass muster in the examination for the Diplomatic Service.

Another gradual change in the organisation of the Foreign Office should be mentioned. Until almost the end of the nineteenth century the work was considered so confidential that hardly any paper was allowed to pass out of the hands of the first division clerks. As the work became heavier this entailed an amount of routine work, including ordinary copying, which became intolerable. Consequently, second division clerks and typists were admitted in increasing numbers to cope with the routine duties, until in 1906 the whole of the filing and registration of papers was handed over to the former and the whole of the copying to the typists. The class of work entrusted to the second division has since been further expanded, and the war has brought into being a bevy of shorthand writers. The work is now therefore carried on under happier conditions for the higher staff.

So far nothing has been said of the Consular Service. Up to 1903 Consuls were appointed haphazard; each post stood by itself; a man was appointed Vice-Consul at Timbuktu or Consul at Kamchatka and might remain there for the rest of his life, for there was no regular service or course of promotion. Most Vice-Consuls were, in fact, promoted to be Consuls sooner or later, and many Consuls were promoted to be Consuls-General, but many posts in all ranks were filled by "patronage" appointments pure and simple. The rule was that men so appointed must acquire within a year the language of the country in which they resided.

Most of the Consulates were in seaports; the main function of Consular Officers was to administer the Merchant Shipping Acts and perform certain notarial services for British subjects. Consuls certainly did not do much for the promotion of British trade, but they were not there for that purpose. As time went on they were required to devote more and more attention to commercial matters, until the world began to assume that their main duty was to foster British trade. Then they were severely

criticised for knowing too little about trade and doing too little for its extension. It might have been almost as reasonable to blame a naval officer who was called upon to read the Church Services for not knowing enough about theology.

The Consular Service really became a service after the report of Sir William Walrond's Committee of 1903, which gave practical effect to some suggestions of Sir Francis Villiers. From that time the service was recruited by competitive examination; provision was made for promotion from one grade to another, and a regular scale of pay and allowances was substituted for the former individualistic system under which each post had a salary peculiar to itself. The examination thus set up was not of a very high standard, and the Committee had leanings towards the favourite theory of giving a preference to men with business experience. In actual fact, men who combine ability with business experience are found to remain in business and become millionaires; it is only the failures who are willing to leave business for the Government Service. This does not imply any disparagement to the brains of the Consular Service. The explanation is, as already suggested, that at the outset Government service attracts men who are ambitious of influence or adventure, rather than of wealth, and on a lower plane men who play for safety in preference to speculation; apart from this there is the hereditary instinct; the sons of civil servants follow in their father's footsteps just like the sons of business men, of soldiers or of chimney-sweeps. Men do not skip lightly from one path to another.

In any case, practically no men with business training entered the Consular Service, and the recruits were of the same type as those for all other branches of the Civil Service. Nevertheless strenuous efforts were made to improve and extend the commercial work of the Consular Service, and to a large extent they were successful, so much so that American and German Consuls frequently took their reports from those of their British colleagues.

Criticism of the Consular Service, however, continued unabated, being generally based, as such criticism often is, on the defects of earlier days rather than on those of the present. It

was by now, however, an accepted idea at headquarters that the primary functions of Consuls were no longer notarial and administrative but concerned with the extension of British trade, and posts were more frequently established in inland cities.

This account of the three branches of the Foreign Service has now come down to the period of the war, for no other serious changes were made until quite recently.

During the last two or three years, however, a much more complete scheme of organisation has been carried out in all branches of the service.

The Foreign Office and Diplomatic Service, always more or less unified, have now been definitely amalgamated, and a system of allowances, which includes free housing, has been devised for those employed abroad, which it is hoped will enable them not only to live on their pay, but to enter freely into the social life of the capital to which they are appointed. This has made the so-called "property qualification" of £400 a year unnecessary, and will throw the career "open to all the talents." The examination will still be, as it has been for a good many years, the same as that for the general Civil Service and the Indian Civil Service, special provision being made to ensure that the candidates attain a high standard in French and German. There will also, no doubt, be a Board of Selection. This seems necessary, if only on the score of economy, for without it the money to be spent on allowances would be wasted; it is useless to give men relatively large incomes to enable them to mix in social life if they are naturally unfitted for doing so. These observations about the examination are in the future tense, because from 1914 to 1918 there were no examinations, and from 1919 to 1921 the examinations, like those for other services, are of a special type adapted to young men who have had no chance of completing their literary education.

Another important change in the economy of the service abroad, which has grown up during the war, and will now be continued, is the free use of clerks and typists where formerly junior secretaries, with an elaborate education, had to spend years in purely routine work.

This reform will, it is hoped, set free the younger diplomats to learn something more of the country where they are living than has lately been possible. There can be no greater mistake than to suppose that the young secretaries should be kept all day at a desk, and the relatively leisured young men of thirty or forty years ago were in a much better position to learn their trade than the industrious apprentices of more recent years.

The internal organisation of the Foreign Office has also been changed. During the course of the last hundred years the constant increase of work had led to the creation first of one assistant under-secretary and finally of three such officials: this meant that there were four grades below the permanent under-secretary—namely, junior clerks, assistants, senior clerks, assistant under-secretaries—and that each paper of importance, after escaping from the routine sections where it was filed and registered, passed, in ordinary cases, through four hands before it reached the top; senior clerks and assistant-under secretaries have now been thrown into one class, and the papers of importance have thus one step less to climb. Under the permanent under-secretary is an assistant under-secretary, who acts as his deputy, and eight assistant secretaries, each with a separate department of senior and junior clerks engaged in devilling for their superior officers. Some such system remains inevitable if the grain is to be sifted from the chaff before being presented to the higher authorities.

These departments are arranged on geographical lines, and the reorganisation has led to the disappearance of the "commercial department." This change is more important than it sounds, because it means that the care of our commercial interests abroad is looked upon as part of the normal work of the political departments and not a thing apart or of less interest than politics proper.

Some of the work done by the old "Commercial" department is now done by the Department of Overseas Trade, which is, however, concerned with the collection and distribution of commercial intelligence more than with the care of vested interests.

The Consular Service has shared in the general reorganisation. In the first place the scales of pay have been assimilated to those for the Diplomatic Service, a change which, if it does not imply, at least facilitates, transfers. Larger salaries are being paid; house or house rent is everywhere to be provided. Increased clerical staff will leave the Consular officers more time for executive work.

A serious examination is imposed for candidates, and elaborate schemes are being brought into effect for giving Vice-Consuls a thorough training in economics before they take up their posts abroad.

Apart from the Consular Service, or rather between it and the Diplomatic Service, a new Commercial Diplomatic Service has been formed to take the place of the small group of Commercial Attachés who divided the world between them, and to undertake the work of organising and developing our system of commercial intelligence. In the more important countries there is now a Commercial Counseller, ranking next to the Counseller of Embassy, who is the deputy of the Ambassador; he has under him one or more commercial secretaries, and the junior diplomatic secretaries are to take their turn in working in his department of the Embassy. In less important countries there is a Commercial First Secretary with a suitable staff on similar lines. Each member of the Commercial Diplomatic Service has, with a fixed salary which is generally higher than that of his opposite number in the Diplomatic and Consular Services, a special allowance of which some portion is to be spent on entertainment. This service is being recruited partly from the Consular Service and partly from outside, although outside recruits, with good experience, are not always easy to find; later on, the members of the Consular Service, who will have received a good training, will be still better qualified for this kind of promotion.

Both the Commercial Diplomatic and the Consular Service are under an additional Parliamentary Under-Secretary, who is head of the Overseas Trade Department, and by a novel arrangement is also an Under-Secretary of the Board of Trade.

It would require much space to describe the history and

constitution of the Overseas Trade Department, and for our immediate purpose it is sufficient to say that it is for those affairs which concern the Foreign Office a department of that office, in which are employed several members of the Diplomatic Service and a number of Consular officers, besides others from outside.

There are, therefore, now three services, the Diplomatic Service, the Commercial Diplomatic Service and the Consular Service, under one head, the Secretary of State for Foreign Affairs, each service being closely united with the others. Whether they will ever be amalgamated entirely is doubtful; it is possible that an attempt to bring this about would spoil all of them. The men who are badly wanted for the Diplomatic Service might be harder to get if they thought that it might be their fate to spend many years in a remote Consulate; the men who are wanted for the Consular Service or the Commercial Diplomatic Service might not find themselves at home in an ordinary diplomatic post and might get out of touch with things commercial. This does not mean that diplomats are to divorce themselves from commercial interests—on the contrary, it is intended that they shall devote themselves more assiduously to such matters—but it does mean that the Secretary of State must have absolute discretion in making use of his instruments; he must be able to transfer suitable men from one service to another, but not be open to complaints if he does not transfer men who consider themselves suitable.

On the whole the prospects of all the services are at present good. Salaries which two or three years ago seemed generous have lost some of their brilliancy, but they ought to be sufficient still to attract the best men of that class who prefer the service of their country to the making of fortunes, even when it entails less independence and less play, and who are attracted by the touch of romance proper to a career which may lead them into strange adventures in all parts of the world.

THE LEAGUE OF NATIONS AND THE LAWS OF WAR

The second of President Wilson's famous Fourteen Points stipulated for the "absolute freedom of navigation upon the seas outside territorial waters, alike in peace and war, except as the seas might be closed in whole or in part by international action for the enforcement of international covenants."

On this point the Allied Powers in agreeing to the Fourteen Points as the basis of the terms of Armistice made special and definite reservations. Perhaps for this reason the freedom of the seas never became an issue at the Peace Conference. But at one time it nearly did so; and the question is one which is still sometimes discussed, and which will certainly be raised again in the near future.

It is worth while, therefore, to consider more carefully exactly what this second point as defined by President Wilson really meant.

First, it may be pointed out that the absolute freedom of the seas in time of peace is agreed to by every one, and has been effectively acted upon for a century at least. Second, "the closing of the seas for the enforcement of international covenants by a League of Nations" is similarly agreed to, and was embodied by the Peace Conference in Article 16 of the treaty. The establishment of the supplementary international law which is required for this purpose, if any is required, is in principle at least a simple matter. Therefore, the controversial matter on which President Wilson by his second point wished to establish legally defined rules is narrowed down to the law of "private" war at sea : the meaning of his point is merely this, that he wished to set up a code of rules

for the conduct of wars between individual states undertaken without the sanction of the League. In other words, if the second point had been acted upon it would have been necessary for the Peace Conference to rewrite a large chapter of the laws of war, in exactly the same manner as had been done by the Hague Conference in 1907, and as the Conference of London attempted to do two years later.

A similar but more general proposal, emanating from a weighty source in this country, deserves attention. In his book written in 1918, Lord Phillimore proposed that the amendment of the laws of war and the provision of some means for their enforcement should be part of the work of the Peace Conference, and that when these new rules were completed they should be inserted into the final treaty. He made this proposal, to quote his own words, " for two reasons; first, to make war when it does occur less intolerable than the present war has been, secondly, to prevent war by taking away from some nations the temptation to rely on their superior capacity of committing atrocities as an element of success in war." Lord Phillimore's proposal had no more success than President Wilson's second point as an issue at the Peace Conference; but the idea on which both were based, that it was essential for the future that the laws of war should be rewritten by an international authority of high standing, has not yet been abandoned. The proposal now takes the form that the League of Nations should take up the question and should continue the work of the Hague Conferences, by devoting its attention to the codification of rules for the conduct of military operations. The latest exponent of this idea is Mr. Winston Churchill, who recently said in the House of Commons that the use of poison gas in future warfare is a question which should be regulated by the League.

In view of the history of the Hague Conferences, and of the high authority behind the proposals which have been quoted, it is worth while to examine carefully the motive ideas of Lord Phillimore, who states the proposition more generally and more clearly than any one else has done.

An attempt will be made to consider these ideas, and the conclusions deduced from them, from two different points of view; first, in relation to the facts of modern warfare and the nature of modern intercourse between nations; second, in relation to the history of the laws of war and the historical traditions of international jurisprudence. An attempt will also be made to draw from the considerations put forward certain conclusions as to the future action of the League in connection with the subject under review.

I

It must be said at once that Lord Phillimore's motive ideas seem to spring from a misconception of the whole character of modern war. In the first place, it is almost inconceivable that any nation which is contemplating a declaration of war would be prevented from declaring it by conventional limitations on the use of force agreed to in any international code of rules. The only possible case is that of Great Britain had she accepted President Wilson's second point as it stood. But, in fact, if wars between individual states continue, no such sweeping limitations of force will be agreed to, for they are contrary to the nature of war. In the second place, it is a complete misconception to imagine that any future war between great Powers (which is the sort of war to which the rules must be adapted and which really is the only sort worth consideration) can by any laws whatever be rendered "less intolerable" than the late war. War is intolerable in proportion to the destruction of life and property it affects, and it is certain that if wars between individual states continue they will become not less destructive but more so. This is a necessary consequence of the application of science to warfare, and cannot be prevented except by the prevention of war itself. Any future war will be incomparably more intolerable than the late war has been.

This last point may perhaps be carried a little further. As the scale of war increases it becomes not merely the

function of an army or a navy but an effort of the whole of society, so its hardships and horrors must spread to every class of society. The use of violence against women and children, especially at sea, caused great indignation during the late war, but clearly women and children working in a munitions factory are a legitimate object for bombardment, and so are the encampments of Women's Auxiliary Forces. Similarly, the increase in the number of aircraft and in the size of bombs already developed makes it certain that in the next big war the destruction of whole towns by aerial bombardment, as complete as their destruction now is by artillery, will be allowed by any rules of war that are likely to gain acceptance. Such destruction will make the life of the civilian population of a belligerent state very much what the life of the soldier in the trenches has been in the last five years. Moreover, without exception the most effective weapon in the late war was the starvation by blockade of the whole civilian population of enemy countries. It is certain that if wars between individual states continue, the belligerents will not give up this weapon. It is therefore a platitude accepted by every military thinker that no rules can prevent any future war from damaging civilian populations infinitely more than they were damaged during the late war.

There is a further vital difficulty connected with the protection of neutrals in any future war between individual states. Modern war being an effort by the whole of society, the whole activity of society, including all trade with neutral states, contributes to military success. Belligerents have the strongest interest to stop the whole of such trade by their enemy. No law defining neutral rights could be devised that would not be broken whenever a belligerent felt strong enough to break it. It is for this reason and owing to the international interdependence of interests from which it springs that any future war will, like the past one, tend to become universal, and it is for the same reasons that the neutrals have shown such a striking willingness to accede to the League of Nations.

If, then, the codification of the laws of war can by the nature

of modern warfare do nothing to better the lot of civilians or to render war generally less intolerable than it has been, and if such codification will not really help either to prevent the outbreak of war or to protect the interests of neutral states when it has broken out, the drawing up of such rules would seem prima facie to be both a thankless and a barren task. Fortunately, the Peace Conference decided after slight hesitation that it was not a task that it was worth while to undertake. The Conference was right in judging that little good could come of any attempt to establish rules which would require a most effective League of Nations for their maintenance before the League itself had been established. And even now that the League has been established there are other general considerations which make it equally doubtful whether the League can any more usefully occupy itself in codifying the rules of war than the Peace Conference could do.

For example, it may well be doubted whether any rules which could at present be devised would really be adequate to the conduct of the next war. The whole nature of warfare alters with the progress of invention, and in accordance with that change of nature the law must change too. The late war demonstrated nothing more clearly than that the law of sea warfare as it stood in 1914 would have been, even had it been observed, totally inadequate to the operations which it should have controlled. Similarly, no rules of warfare at sea drawn up in 1920 could be adequate to the naval operations of 1940. The future of the hydroplane and of the submarine as weapons against merchant shipping, and that of the aeroplane as a carrier of contraband, are by themselves problematic enough to make even the attempt to devise such rules almost certainly unfruitful. And there is this further consideration: if a fixed code of rules were to be drawn up by the League of Nations, and if subsequently invention were to change again the nature of warfare, the fixed code of rules which had been established would be worse than none, for no rule which was contrary to the nature of war would be observed, and a rule that is not observed only serves to discredit the law, and to

drag other nations into a quarrel from which they might have kept clear.

There is a further reason, and a most important one, why the codification of the law of war is a task which it is most difficult for the League of Nations to attempt. Almost every question connected with the laws of war is necessarily controversial, and for the last half century has become increasingly so. But there is no part which is so controversial as the relations between belligerents and neutrals. Yet this is the centre of the whole code of the law of war at sea. If there are not rules effectively to control the relations of belligerents and neutrals there is no law of war that is worth consideration. Even before the last war this was a subject on which agreement was exceedingly difficult to secure. The whole matter was discussed at the Hague and parts of it again at the Conference of London in 1909. The rules which were thus laboriously evolved were afterwards rejected by the very Governments which drew them up. At the present time, so far as sea warfare at least is concerned, there are hardly any accepted principles from which discussion could even begin. "It has become apparent," Oppenheim wrote in a private memorandum in 1917, "that international law concerning the rights of neutrals in sea warfare is entirely unsettled." The extreme divergence of the views which would be put forward if the subject were raised is illustrated by the fact that many people in Great Britain would wish not only not to extend the rights of neutrals in the sense proposed by President Wilson, but would on the contrary wish to denounce the Paris declaration of 1856. The fact of the matter is this, that the interests of a belligerent with sea power are so sharply in conflict with those of neutrals that probably no settlement could be arrived at which would be generally accepted.

The first general proposition which is here put forward is that the Governments of the world who have combined to establish the League of Nations would make a disastrous mistake if they proposed to use the new machinery which they have set up to solve the old problems connected with the codification

of the laws of war. The task with which the League of Nations should deal is rather the building up of a new body of international law for time of peace. There are innumerable problems of international life, innumerable conflicts and coincidences of national interest for which an effective body of law is required. It is hardly necessary to mention the questions of communication, transit, of colonial policy, of public health, of labour legislation, and of the settlement of disputes for which international law has hitherto failed adequately to provide, but which cannot any longer be avoided.

The second contention which is now put forward, and which will be examined further in the second part, is that the failure of international law to provide solutions to the problems of peace has been at least in part due to the fact that the attention of writers and statesmen has always been diverted from the law of peace to the law of war. This preoccupation with the law of war has not only diverted attention from the difficult, but infinitely more important problems of peace, it has also rendered comparatively barren efforts at international " legislation " which might have led to the best results. There is also at least a case for thinking that it has undermined the whole moral force of international law in the minds of people at large. A law, of which the most discussed and the most conspicuous part, and of which it was often erroneously asserted that the only " real " part, was the law of war, could not command much popular respect. Every war produced violations of its rules, and even more allegations that they had been violated. These violations left the injured party with no sanction but that of reprisals—" of no use unless you are the stronger side," as Lord Phillimore has said. For these reasons Westlake (*Collected Papers*, p. 238) holds that the rules that control hostilities are the worst and weakest part of international law; and yet it is by this worst and weakest part that international law has always been popularly judged and discredited.

Of all this, the most unfortunate result is that this diversion of attention from the law of peace has left that law seriously

inadequate to the subject matter it should control. The League of Nations must not delay in taking up the task which this inadequacy throws upon it. For in the view taken in this paper it is the chief task of the League to remove this inadequacy, and by the development of true legal processes, and by the establishment of the authority of international covenants and law in time of peace, to work out a stable system for the world.

II

An attempt will now be made very briefly to sketch the historical background of the two main contentions put forward in the first part, namely, that the preoccupation of writers and statesmen with the laws of war has been a real obstacle to the progress of international law, and that it is by the development of the law of peace, rather than by renewing the attempts to codify the law of war, that a stable international system can be built up by the League of Nations.

. . . . . .

It was the great work of Grotius which first established the predominance of the laws of war in the study and exposition of international law. That Grotius himself should have thought the laws of war of paramount importance is explained by the motive which made him devote his labours to "the noblest part of jurisprudence." That motive he thus explains: "I, holding it to be most certain that there is among nations a common law of rights which is of force with regard to war and in war, saw many and grave causes why I should write a work on that subject. For I saw prevailing throughout the Christian world a licence in making war of which even barbarous nations would have been ashamed; recourse being had to arms for slight reason or no reason; and when arms were once taken up all reverence for divine and human law was thrown away, just as if men were thenceforth authorised to commit all crimes without restraint." (Whewell's Translation, Preliminaries, par. 28.)

Grotius' motive, then, in laying the foundations of the modern law of nations was to mitigate the horrors of the wars which in his day ravaged Europe. It was natural, therefore, that the scheme of his book (Preliminaries, pars. 32–5) should show war as the basis or the source of almost all his reflections and studies. It was this characteristic of his book which established among exponents of jurisprudence the tradition, which has survived to the present day, that the chief function of international law and the sphere in which it achieves most indisputably real "positive" existence, are both to be found in the laws of war.

The reasons why this tradition was established so firmly, and has endured so long, are the following. In the first place, Grotius achieved a brilliant success in the object for which he wrote. Not only did his work have a great literary success, but it was the cause of an immediate and permanent improvement in the practices of war. The atrocities of the Thirty Years' War were not reproduced in the wars of the next two centuries after he wrote; and war being then conducted by small armies, the misery it inflicted when those armies regulated their conduct in accordance with his rules of humanity, was very greatly reduced. This positive success made the moral force of the laws of war loom very large in the minds of jurists, statesmen, and peoples.

Secondly, the enormous personal authority of Grotius himself caused most of his successors to follow closely the path he had marked out. His work in itself was so much better and so much more complete than anything that had preceded it, and than almost anything that came after it for a very long time, that his authority remained almost decisive, and even yet is not without weight. And his indirect influence has been even greater than his direct authority. For he wrote as a scholar and a lawyer, but he achieved the work of a statesman; and throughout the eighteenth and nineteenth centuries the weight of his own words was reinforced by that of innumerable mediocre writers, not without fame in their own day, who were content to paraphrase and reproduce what he had created.

Thirdly, there is this important fact to remember : that in the seventeenth and eighteenth centuries the relations between nations in time of peace were very much more infrequent and unimportant than they are to-day. Their relations through war, whether as belligerents or neutrals, were a very much larger part of the whole of their intercourse than such relations are in the twentieth century. It was natural, therefore, that the law of war should present itself as the most important subject for legal regulation between states to all who concerned themselves with international relations.

These causes established the Grotian tradition so securely that it dominated the growth and development of international law throughout the nineteenth century. That it should have done so was contrary to the essential facts of the nature of international society, and contrary to the dictates of reason : for all the three causes above described ceased in the nineteenth century to hold good.

In the first place, in the nineteenth century, war so increased in scale and in destructiveness, that the contribution made to human welfare by the laws of war, while still considerable and by no means to be discounted, was yet negligible compared to what it had been. The rules of Grotius in his own day enormously reduced the suffering caused by an outbreak of war; but their efficacy was reduced by the inventions and development brought by every decade of the last century, until to-day no rules can prevent war from being infinitely more intolerable every time that it occurs.

In the second place, the authority of no one classical writer should in the nineteenth century have exercised the decisive influence which Grotius, directly or indirectly, exercised on international law. There was a great body of literature, and a great number of jurists who studied it; there was a large amount of custom and usage; there was material for great progress in the science and practice of international law, had there been a modern Grotius to effect it—some one with a great statesman's view of international law and with a great statesman's power of gaining acceptance for new conceptions

and new obligations. It was against reason, therefore, that the Grotian tradition should have continued to dominate the science of international law.

In the third place, the improvement of communications and the growth of international commerce and exchange so intensified the intercourse between nations that their war-relations became comparatively an insignificant part of the whole. This growth of intercourse demanded a corresponding growth in the international law of peace—a growth which, had it been adequate, would have rendered the law of war comparatively insignificant. But it was not adequate; there was a growth of law indeed, and much of the increased intercourse was regulated by Convention; but the law of peace lagged far behind the requirements it should have fulfilled, and the growth of interests and opinion which it should have reflected.

This last-mentioned shortcoming was the more remarkable in that the nineteenth century added to custom and reason as sources of international law, the method of international "legislation" by Conferences of States. This began at the Congress of Vienna and developed fitfully until Hague Conferences devoted themselves exclusively to the work of codifying and creating law to govern international relations. This method of legislation latterly became the most important source of international law; it was certainly the most spectacular, and had it produced good results, it might have added enormously to the legal value and to the moral authority of international law.

It might have been expected that this method of "legislation" would have produced attempts to deal by general rules with the great problems that absorbed the energies and attention of the whole world during the nineteenth century. There was material enough for law : the extraordinary development of colonisation in uncivilised parts of the world, the growing international solidarity of economic interests, the increasing cost and destructiveness of war, and the consequent increasing importance of preventing its outbreak, were all matters that seemed to demand the creation of rules. And in fact attempts

were made to deal with them by Conference Legislation. The problems of colonisation produced some declarations about the slave trade, and much later some discussion of native rights and some regulation of colonial traffic in arms and liquor. The problems of commerce produced rules about the common rights of the Society of States over international rivers and inter-oceanic canals—though in the development of these rules Conference Legislation played a smaller part than might have been expected. The problem of war produced some rules of doubtful value about recourse to mediation, and some machinery established at the Hague to secure the peaceful settlement of disputes.

But the principles underlying these rules were never worked out by the Conferences that enunciated them; they were left to develop by the slow growth of custom—or not to develop, as the case might be. It was the Grotian tradition that really dominated the use of Conference Legislation. As against the meagre and spasmodic treatment just indicated of the great problems of peaceful intercourse, the method of Conference Legislation was used to codify, confirm and amend drastically and repeatedly the laws of war on sea and land. The following list of Conference Conventions on the laws of war may be compared with the sparse " peace " results above referred to—

1856. Declaration of Paris on Maritime Law in time of war.
1864. Declaration of St. Petersburg forbidding the use of certain arms.
1868. Geneva Convention for the protection of the sick and wounded.
1868. Geneva Convention :—Additional Articles.
1906. Geneva Convention :—Amendment and extension.
1899. " Peace " Conference at the Hague : one Convention dealt with the peaceful settlement of international disputes; two Conventions and three Declarations dealt with the Law of War.

1907. Second "Peace" Conference at the Hague: two Conventions dealt with the Law of Peace, *eleven* Conventions and one Declaration dealt with the Laws of War on Land and Sea.

1909. Declaration of London on the Laws of War at Sea.

It is perhaps worth while to inquire why the method of Conference Legislation was applied with so much more persistence and thoroughness and apparent success to the law of war than to the infinitely more important problems of the law of peace.

Westlake explains the amelioration of the laws of war by the operation of two moral forces. "The cause of this rapid career of improvement," he writes, "must be something more than the renewed belief in a commonwealth of mankind which has been mentioned above as marking our time. . . . Along with the renewal of that belief there has come a remarkable development of the sentiment of pity, of an enthusiasm of humanity which has caused a wider and keener sympathy with suffering than has perhaps ever before been known" (*Collected Papers*, pp. 278–9).

Now it may be remarked that both these moral forces might have found their expression in the improvement of the law of peace quite as logically as in that of the law of war. "A renewed belief in the commonwealth of mankind" and an "enthusiasm of humanity" might both have led to legislation for the better treatment of native races or to international legislation for the improvement of labour conditions, or to laws for the prevention of war. Indeed, it is remarkable that they did not. For there were other moral forces at work in the nineteenth century tending in the same direction. There was, for example, the wave of philanthropic feeling which swept England on the subject of the slave trade. And there was a widespread and persistent desire, springing from the renewed belief in the commonwealth of mankind and attested by the repeated recourse to settlement of international disputes by arbitration and by the calling of the Hague Conferences, to improve international law for its own sake,

to regulate international relations on the basis of justice, and to build up a legal system which would replace force by law as the final arbiter of nations.

But all these forces were swept into the improvement of the laws of war. When they touched any concrete problem of international peace relations they led usually to the enunciation of some broad general principle; but this principle was not worked out into a comprehensive and practical system of law. Take, for example, the treatment of native races. In Annex 15 of the Treaty of Vienna there was a general declaration against the slave trade, which was condemned then as now by the conscience of the civilised world, and during the nineteenth century the same moral forces led to the abolition of slavery in various parts of the world. Not until the Berlin and Brussels Acts, however, was the principle of the Vienna Declaration even discussed internationally again. And then it led to some international Conventions, the inadequacy of which has been illustrated by the whole of subsequent African history. This failure cannot be attributed to the lack of moral forces—Westlake himself is witness that they existed. Nor is it due to the fact that problems of colonial administration did not attract the attention of statesmen—in fact, every government with colonial possessions was perpetually preoccupied with such problems. Nor is it due to the lack of a real interest to be served—international agreements on the lines of the mandates now proposed might have done much to promote the true welfare of both white men and their native subjects. Westlake attributes the failure of international law to deal more effectively with the slave trade to the prevalent exaggerated idea of national independence (*Peace*, p. 323). This is another way of saying that it was due to a failure to appreciate the true function of international law. Statesmen and lawyers did not envisage the uses of international law for the prevention of suffering and abuse in time of peace; and Westlake's moral forces were diverted to endeavours to prevent abuse in time of war.

Similar illustrations may be taken from other parts of

the history of international relations in the nineteenth century. The Congress of Vienna laid down a fundamental principle as to the rights of non-riparian states on international rivers. This principle indeed has had much recognition and some development during the last hundred years. But no international Conference has ever endeavoured to "legislate" for its extension to straits, canals, ports and railways. Yet if the principle were valid in one sphere, it should have been extended to the others; and the immense growth of international commerce might have been expected so to extend it. Such extension would have been in the interests, not of land-locked states only, but of every state in the inter-dependent community of nations; it is an extension which the League of Nations will have to bring about and which it has indeed already begun to consider.

Again, Article 8 and Protocol 23 of the Treaty of Paris of 1856 introduced into international law certain rudimentary rights of mediation by third parties in disputes which threaten an outbreak of war. These rights were much used in connection with the Eastern Question; Sir Thomas Erskine Holland has much of interest to say about them. But they were scarcely mentioned in International Conferences until 1899; and neither Hague Conference gave them any substantial development. Yet one of the basic facts of international society was that a war between two states was of vital interest to other states. Had the system of Conference Legislation been used as it might have been used, it would have so developed the rudimentary principle of 1856 that third parties would have been given not only an absolute right, but even a duty, to mediate and to enforce consideration and delay before any individual state threw international society into confusion by declaring war. Surely the prevention of war was as true an international interest as the prevention of abuse during war, and surely it was one which called as urgently for agreed regulation by Conference Legislation. Yet it is only after the Great War that those principles have been embodied in the Covenant of the League of Nations which should have logically

developed from what was recognised and enshrined in a treaty sixty years ago.

Had international law developed as it is above suggested that it might have done, it is conceivable that the Great War might have been averted; it is even conceivable that the League of Nations might have come about by evolution instead of revolution. The failure of international law is due to many a powerful cause; no law can outstrip the moral standards of the mass of those who are subject to it. But, in part at least, it is due to the failure of the statesmen and jurists of the last century to use the moral forces of their day for the development of international law along the lines of true progress; and this in turn, it has been argued, is due to their preoccupation with the laws of war. It is for the statesmen and jurists of our day to bear this lesson continually in mind, and to apply it in the use they make of the new international machinery of the League.

THE NEUTRALITY OF BRAZIL

In considering the Regulations issued from time to time by Brazil with a view to the preservation of her neutrality during the European War, the geographical position of that vast country must continually be borne in mind, more especially as some of her Regulations constitute what amounts almost to a new departure in International Law.

Brazil, which lies on the great trade route between the Argentine and Europe, was dependent, in the main, for her sea-borne commerce upon the merchant ships of Great Britain, Germany, Austria, France, Italy and Holland. It was the merchant fleets of these countries that brought goods to Brazil and carried away the coffee and rubber upon which the Republic was chiefly dependent for her revenue. Her overseas commerce was absolutely vital to her continued existence as a solvent State. Soon after the outbreak of war, German and Austrian merchantmen were confined to port. Many British and French ships were taken off the run, and somewhat later many Italians also. Brazil had no large ocean-going steamers of her own. It was, therefore, vital for her, in so far as her neutrality would permit, to do what she could to prevent undue interference with peaceful merchantmen trading with her ports.

General Neutrality Regulations

When war broke out Brazil issued her general Neutrality Regulations under date of August 4, 1914. These were based on the Hague Convention, No. 13, of 1907, and were, indeed, practically quoted from it. There were, however, two provisions which constituted a new departure and which do not appear to be based upon any recognised rule of international law.

Article 22 provided that belligerent men-of-war, which took refuge in Brazilian ports when being pursued by the enemy, and in order to avoid imminent attack, should be detained until they were disarmed. They would, however, be permitted to leave again if their commanding officers undertook to take no further part in the war. This latter provision was repealed by a decree of September 9, 1914.

Article 24 provided that the captains of men-of-war, which entered a Brazilian port for purposes of repair or to receive provisions or fuel, should be requested to give a written undertaking that they would not seize merchantmen flying the flag of their enemy even outside Brazilian territorial waters, should those merchantmen be found within longitude 30° W. of Greenwich and latitude 4° 30′ N. and 30° S., and should they have left Brazilian ports with cargo received there or carry a manifest of cargo destined for Brazilian ports. This Article was repealed for the duration of the war only by a decree of October 14, 1914.

Article 20 of the general Rules of Neutrality provided that prizes could only be brought into a Brazilian port on account of unseaworthiness, stress of weather, or want of fuel or provisions (Article 21 of Hague Convention, No. 13). A case arose, however, in which a German ship with cargo for Brazil was captured by British naval forces off the coast of Brazil. In view of the above Regulations she could not be brought into a Brazilian port, but would have had to have been sent to a British port for Prize Court proceedings. The Brazilian Government saw that it was in the interests of Brazilian trade that prizes with cargo for Brazil should be allowed to come to Brazilian ports to discharge their cargo and should be allowed to leave again. They, therefore, added a sentence to that effect to Article 20, which thus read : " Prizes made by a belligerent may only be brought into a Brazilian port on account of unseaworthiness, stress of weather or want of fuel or provisions, or with a view to discharging merchandise destined for Brazil." At the same time a paragraph was added to Article 21, which Article provided that prizes, whether under convoy or not, might be admitted

to Brazilian ports, if brought there to be sequestrated pending a decision of the competent Prize Court (Article 23 of Hague Convention, No. 13). The added sentence ran: "In any of the hypotheses referred to in Articles 20 and 21, the Brazilian Government reserve to themselves the right of demanding the discharge from prizes of merchandise destined for Brazil."

Rules Governing Departure of Belligerent Merchantmen from Brazilian Ports

When the war broke out there was considerable uncertainty as to whether neutral Powers had the right to prevent the departure from their ports of belligerent merchantmen, whose sole object was to coal and provision belligerent men-of-war. It appeared doubtful whether the Brazilian Government could properly prevent sailings and whether, if they had such a right, they could draw up regulations of a reasonable kind which would fulfil their purpose on the one hand, and, on the other, would not interfere with legitimate commerce. During the first six weeks of the war seven or eight German merchant vessels left Brazilian ports with the scarcely-concealed object of coaling and provisioning the *Karlsruhe* and other commerce raiders. In some cases they remained with the raider, in others they returned to a Brazilian port after furnishing the raider with coal and provisions. It could not be argued that this was legitimate commerce, and it became evident that the Brazilian ports were being used as a base of naval operations in violation of Article 6 of the Brazilian General Regulations of Neutrality (Article 5 of Hague Convention, No. 13). The Brazilian Government, therefore, issued a decree on September 9, 1914, providing that no merchant vessel might leave a Brazilian port unless the local consular officer of her nationality announced her proposed ports of call and of destination and gave an assurance that she was undertaking the voyage solely for commercial purposes. Any merchant vessel which had left, or in future should leave, Brazilian ports, and in the case of which it was verified, either by the time elapsed or by the course taken, that she had not

sailed directly for the port of call or destination named, would, when she returned to a Brazilian port, be seized by the Brazilian naval authorities, considered as forming part of the naval forces of her country and treated accordingly.

Even this, however, did not entirely fulfil its object. Yet another German merchantman left Pernambuco, joined a German raider and then proceeded to a neutral port out of reach of the Brazilian authorities. The Brazilian Government therefore, on January 9, sent a Note to the Legations of all the belligerent Powers, as well as to those of the neutral Powers represented at Rio de Janeiro, informing them that the Federal Government had decided to detain in Brazilian ports, until further orders, any ships which were then in those ports or in future should enter them and which belonged to a navigation company any vessel of which had infringed the Brazilian Neutrality Regulations. In order to carry out this decision, not only would there be military control but the authorities would also be authorised, in the event of their considering it necessary, to take steps to prevent the vessels from navigating, inclusive of taking from them and keeping in official deposit, the essential pieces of their machinery.

It is not too much to say that the effect of the above regulations was to save many tens of thousands of tons of allied merchant shipping engaged in legitimate commerce. The cruiser *Karlsruhe* blew up some three months after the war had broken out, but her place was taken by the armed merchantmen *Prince Eitel Friedrich* and *Kronprinz Wilhelm*, who would have been able to keep the seas for some considerable time had they been able to draw their coal and supplies from Brazil. They were eventually driven to take refuge at Newport News, where they were interned by the United States Government until the end of the war. It may be interesting to recall that it was off the north-east coast of Brazil that the famous *Alabama* carried on her operations.

Wireless Telegraphy

Article 6 of the General Neutrality Regulations forbade the erection of any wireless telegraphy stations or any apparatus for the purpose of communicating with belligerent forces on land or sea (Article 5 of the Hague Convention).

With a view to carrying this out all merchant vessels which remained in Brazilian ports for more than forty-eight hours had to lower their antennæ and their wireless cabins were sealed.

Early in the war the Brazilian Government wireless stations were closed to all belligerent men-of-war, legations and consulates, but the use of them was permitted to Shipping Companies for strictly commercial purposes, plain language only being allowed.

Treatment of Belligerent Men-of-War in Neutral Waters

Article 13 of the General Regulations of Neutrality (Article 17 of the Hague Convention) laid down that in Brazilian ports belligerent warships might only carry out such repairs as were necessary to render them seaworthy and might not add in any manner whatsoever to their fighting force. The Brazilian Naval Authorities were authorised to decide what repairs were necessary and these repairs had to be carried out with the least possible delay.

In accordance with this provision, H.M.S. *Glasgow* was allowed to repair after being seriously damaged in action at Coronel, H.M.S. *Carnarvon* and H.M.S. *Bristol* after damage received through accidentally striking rocks.

The German gunboat *Eber* left Luderitzbucht on the outbreak of war, joined the German merchantman *Cap Trafalgar* on the high seas and transferred to her her armament, officers and crew. She took on board from the *Cap Trafalgar* a merchant crew and entered the Brazilian port of Bahia flying the German merchant flag. The Brazilian Government decided to intern her and her officers and crew until the end of the war, but the latter were subsequently released on parole.

According to the Neutrality Regulations belligerent men-of-war were allowed only to remain twenty-four hours in Brazilian waters.

Article 7 of these Regulations laid down that if the theatre of war, or the naval ports of one of the belligerents, were less than twelve days' voyage from Brazil, the speed of the vessel being calculated at twenty-three knots, no belligerent man-of-war, whether accompanied by a prize or not, might remain in the ports, bays or roadsteads of Brazil more than twenty-four hours, except in the case of a " forced delay." " Forced delay " was interpreted as being—

(1) when the vessel could not effect the repairs necessary to render it seaworthy;
(2) when there was grave risk on account of bad weather;
(3) when it was not possible to leave within the twenty-four hours without being pursued or theatened by an enemy cruising in the vicinity of the port of refuge.

On January 23, 1915, the Brazilian Government sent a Note to the Legations of the belligerent Powers stating that as on Sundays and Feast Days, banks and commercial houses were closed and all work in the ports of Brazil ceased, men-of-war of the belligerent Powers which entered Brazilian ports on such days would be permitted to remain in them for an additional number of hours in order to take full advantage of the twenty-four hours provided for in Article 7.

Question as to the use of Brazilian ports for purely Commercial Purposes by Merchantmen which had formerly been chartered by the British Admiralty

Cases occurred in which British merchantmen were chartered for belligerent purposes by the British Admiralty and subsequently returned to their owners for use in commerce. The question arose as to whether these vessels could properly be allowed to use Brazilian ports and this was decided in the affirmative.

Three Mile Limit

By a Note of August 25, 1914, the Foreign Legations were informed that "as long as the competent Powers did not fix a definite rule as to the extent of the territorial waters of Brazil, so far as territorial jurisdiction was concerned, the distance of three sea miles should continue to be adopted in principle by Brazil as the limit of her territorial waters for the purpose of neutrality during the war."

Belligerent Merchant Vessels in Brazilian Ports that failed to continue their voyage on account of the European War

On September 16, 1914, the Legations of the belligerent Powers were informed that the Federal Government, in the interests of the exact observance of the neutrality of Brazil, had decided that merchant vessels belonging to the belligerent Powers, which had entered, or in future should enter Brazilian ports, to discharge passengers or cargo, alleging, as their reason for not continuing their voyage, *force majeure* arising out of the state of war in Europe, should be prohibited from leaving these ports without special permission in writing given by the Captain of the Port with the authorisation of the Minister of Marine, and then only on condition of the observance of the other Regulations in force.

Defensively Armed Merchantmen

Defensively armed merchantmen were allowed to enter Brazilian ports on a written guarantee being given by the Legation concerned that their armament had not been and would not be used for offensive purposes.

REGULATIONS of the Government of Brazil establishing General Rules of Neutrality on the part of Brazil in the case of War between Foreign Powers.—Rio de Janeiro, August 4, 1914.

(Translation.)

Residents in Brazil, both nationals and foreigners, must abstain from any acts of participation or of assistance towards

the belligerents, and must not do anything which could be held to be an act of hostility directed against one of the Powers at war.

2. The belligerents are not permitted to take steps in Brazil for the enlistment of their nationals, or of Brazilian citizens, or of nationals of other countries, for the purpose of serving in their sea or land forces.

3. The Brazilian Government does not allow privateers to be equipped or armed in the ports of the Republic.

4. The exportation of articles of war from the ports of Brazil to those of any of the Powers at war, under the Brazilian flag or that of another nation, is absolutely prohibited.

5. The States of the Union and their agents are prohibited from exporting or favouring, directly or indirectly, the dispatch of any war material to a belligerent or to the belligerents.

6. The belligerents are forbidden to use the coast and territorial waters of the United States of Brazil as a base of naval operations against their adversaries, and they are further forbidden to place in those waters floating wireless telegraph stations for the purpose of communicating with the belligerent forces at the theatre of war.

7. If the theatre of warlike operations or the seaports of one of the belligerents are less than twelve days' voyage from the United States of Brazil, the rate of speed being calculated at 23 miles an hour, no vessels armed for war of the other belligerent or belligerents, whether accompanied by prizes or not, may remain in the ports, bays, or roadsteads of Brazil for more than twenty-four hours, unless forced to take refuge in harbour.

By the expression "forced to take refuge in harbour" is to be understood that the warship or privateer shall not be obliged to depart from the port within the period of twenty-four hours in the following circumstances—

(*a*) When she is unable to carry out the repairs absolutely necessary to enable her to put to sea without the risk of being lost.

(*b*) When the same risk exists owing to stress of weather.

(*c*) When she cannot depart within the period of twenty-four hours because she is being pursued or threatened by an enemy ship cruising in the vicinity of the port of refuge.

In the above three cases the Federal Government will exercise its discretion in deciding according to circumstances the period of the vessel's stay.

8. If a voyage of more than twelve days is required for a warship or warships of a belligerent to reach any point of the enemy coast, the period of stay or call in a Brazilian port or waters shall be decided by the Federal Government according to circumstances, both in the case of one or of several warships, and whether these comprise a division or a squadron.

The period of stay in waters of the Brazilian coast of a naval division or squadron of any of the belligerents, composed of more than three fighting units, shall not, however, exceed twelve days.

9. Whatever be the distance between the ports of Brazil and the principal theatre of warlike operations, or between the ports of the United States of Brazil and those of one of the belligerents, privateers with letters of marque from the other or from any belligerent shall not be permitted to remain in the ports or territorial waters of Brazil beyond the period of twenty-four hours, save in the three cases provided for in Article 7.

10. The rules laid down in Articles 7 and 8 with regard to the limitation of the stay in ports, roadsteads, and waters of the Brazilian coast do not apply to warships devoted exclusively to scientific, religious, or philanthropic purposes, or to hospital ships.

11. Any act of hostility, including capture and the exercise of the right of search, committed by the belligerent warships in the territorial waters of Brazil constitutes a violation of neutrality and infringes the sovereign rights of the Republic.

The Federal Government will not only demand due satisfaction from the belligerent Government or Governments, but will also request them to effect the release of the prize, together

with its officers and personnel or crew, if the said prize is already outside Brazilian territorial waters, and the Federal Government is no longer able by means of its naval forces to put a stop to the abuse committed.

12. The Federal Government will employ the means at its disposal to prevent the fitting out or arming of any vessel within its jurisdiction which it has reason to believe is intended to cruise or engage in hostile operations against one of the belligerents. It will also display the same vigilance to prevent the departure from its territory of any vessel intended to cruise or engage in hostile operations, which had been adapted entirely or partly within waters in its jurisdiction for use in war.

13. In ports and roadsteads of the United States of Brazil belligerent warships may carry out only such repairs as are absolutely necessary to render them seaworthy, and may not add in any manner whatsoever to their fighting force.

The Brazilian naval authorities shall decide what repairs are necessary, and these must be carried out with the least possible delay.

14. The ships referred to in the preceding Article may obtain in ports and roadsteads of Brazil only the following supplies :—

(*a*) Of victuals : sufficient to bring their stores up to the normal peace standard.

(*b*) Of fuel : sufficient to enable them to reach the nearest port of their country or to fill up their bunkers built to carry fuel.

15. Belligerent warships which have shipped fuel in a Brazilian port may not, within the succeeding three months, replenish their supply in the same or another Brazilian port.

16. Belligerent warships may not make use of Brazilian ports, roadsteads, or territorial waters for increasing their supplies of war material or their armament, or for completing their crews.

They may, however, avail themselves of the services of Brazilian pilots.

17. The neutrality of Brazil is not held to be affected by the mere passage through the territorial waters of its coast of warships or prizes belonging to the belligerents.

18. When warships belonging to the belligerents are present simultaneously in a Brazilian port or roadstead, a period of not less than twenty-four hours must elapse between the departure of the ship belonging to one belligerent and the departure of the ship belonging to the other, if both are propelled by steam.

If the first vessel to depart is a sailing ship and the second a steamship, the latter may not leave till three days after.

The order of departure of steamships is determined by the order of arrival, unless the ship which arrived first is so circumstanced that an extension of its stay is permissible.

A belligerent warship may not leave the Brazilian port in which she is lying until after the departure of a merchant-ship flying the flag of its adversary, the above-mentioned intervals being observed according as the merchant vessel is a steamship or sailing-ship.

19. If notwithstanding the notification by the competent local authority a belligerent ship of war does not leave a Brazilian port where she is not entitled to remain, the Federal Government will take such measures as it considers necessary to render the ship incapable of taking the sea during the war.

(*a*) The commanding officer of a warship flying the flag of a Power which has ratified the Thirteenth Hague Convention of October 17, 1907, or which has adhered to the same, must facilitate the execution of such measures.

(*b*) Should the commanding officer of the belligerent ship not comply with the notification made to him on any unjustifiable grounds, or because he belongs to a country which has not bound itself by those and other clauses of the above-mentioned Thirteenth Hague Convention, the Federal Government will instruct its naval and military authorities to employ force in order to prevent Brazilian neutrality being compromised.

(*c*) When a belligerent ship is detained in Brazil, the officers and crew shall likewise be detained.

(*d*) The officers and crew thus detained may be kept either on another vessel or on land, and may be subjected to such measures of restriction as it may appear necessary to impose upon them. A sufficient number of men for looking after the

vessel must, however, always be left on board. The officers may be left at liberty on giving their written word of honour not to quit the place in Brazilian territory indicated to them without the permission of the Minister of Marine.

20. Prizes taken by a belligerent may be brought into a Brazilian port only on account of unseaworthiness, stress of weather, or want of fuel or victuals, or, further, in the case provided for in the following Article 21.

The prize must leave as soon as the circumstances which justified its entrance are at an end. If it does not do so, the Brazilian authority will order the captain of the prize to leave at once, and if not obeyed without delay will employ the means at its disposal to release it with its officers and crew, and to intern the prize crew.

A prize brought into a Brazilian port under circumstances other than the four conditions laid down in the beginning of the present Article will similarly be released.

21. Prizes may be allowed to enter Brazilian ports, whether escorted or not, when they are brought there to be sequestrated pending the decision of a competent Prize Court.

The prize may be sent by order of the local authority to another Brazilian port.

If the prize is convoyed by a warship, the officers and prize crew may go on board the warship.

If the prize is not under convoy, the prize crew are left at liberty.

22. Warships of the belligerents which when pursued by the enemy take refuge in a Brazilian port in order to avoid imminent attack will be detained there until they disarm. They will, however, be permitted to depart, if their commanding officers give an undertaking to take no further part in hostilities.

23. No prize may be sold in Brazil until the validity of the capture has been confirmed by the competent Courts of the captor's country, nor may the latter dispose in Brazil of any objects taken from the prize which he may have on board.

24. The commanding officers of naval forces or of warships of any of the belligerent Powers that may enter Brazilian ports

in order to effect repairs or to ship victuals and fuel, will be requested to give a written declaration that they will not capture merchant vessels flying the flag of their adversary even outside Brazilian territorial waters, if met within the waters comprised between the 30° of longitude W. of Greenwich and latitudes 4° 30′ N. and 30° S., should such merchant vessels have left port with cargo shipped in Brazilian ports, or should they bear any manifest of cargo destined for ports of Brazil.

25. None of the belligerents will be allowed to ship in Brazilian ports goods that have arrived directly for the belligerents in vessels of any nationality whatever, as this would indicate that the belligerent ship had not put into the Brazilian port owing to an unforeseen necessity, but with the intention of cruising in the proximity of the coast. To tolerate this abuse would be tantamount to allowing Brazilian ports to serve as a base of operations for the belligerents.

26. Ships of the belligerent Powers admitted into the ports and roadsteads of Brazil must remain at the points which are indicated to them by the local authority, and must preserve complete tranquillity and absolute peace as regards all ships that may be present there, even warships or vessels equipped for war belonging to another belligerent Power.

27. The military, naval, fiscal, and police authorities shall exercise the greatest vigilance to prevent any breach of the preceding provisions in the ports and territorial waters of the Republic.

Ministry for Foreign Affairs, Rio de Janeiro, August 4, 1914.

Frederico Affonso de Carvalho.

THE LEGAL ADMINISTRATION OF PALESTINE UNDER THE BRITISH MILITARY OCCUPATION

By Lieut.-Col. NORMAN BENTWICH, Chief Judicial Officer, Occupied Territories, Palestine

On December 9, 1919, all the communities in Jerusalem celebrated the second anniversary of the delivery of the city to the English army. The future of Palestine has not yet been settled because peace has not been concluded with Turkey; but the parts of the Ottoman Empire in British occupation have enjoyed at least the respite from Turkish misrule. And an account of the legal administration in a military occupation may be of interest in its aspect of applied international law. For more than two years, Judea, and for more than one year, the rest of Palestine (or Occupied Enemy Territory South, as it is officially called) has been governed by a provisional military administration appointed by the Commander-in-Chief of the Egyptian Expeditionary Force. The administration is composed of the Chief Administrator and six Heads of Departments who have their headquarters at Jerusalem, and of a number of Military Governors with their staffs in the districts. The powers of the administration were defined and limited by the laws and usages of war, which require the occupant, till Peace is made and the sovereignty of the country is determined, to carry on as far as possible the system of government which he finds in the occupied territory, and prohibits him from making innovation in the laws of the country. Martial law was indeed proclaimed at the time of the entry into Jerusalem; but it has been applied only for the purpose of protecting the Army of Occupation and for supplementing the Ottoman law where necessary. It has been enforced by special military courts composed of British officers, while the civil courts

have dealt with all other offences and with all civil matters according to the Ottoman law. That law has been applied with some modification for over forty years by the English administration in Cyprus, and was therefore fairly accessible to the military authority. But if there has not been any considerable change of law, there has been a great change of spirit; and every department of government, and, more especially, the Department of Justice, has been reformed by the supervision of British officers.

Prior to the Occupation, the Turks had carried away with them nearly all the judges of the Courts and the Court records and Land Registers. Their intention, no doubt, was to hamper the administration of the country; but, in fact, they made the task of reform simpler. They had employed an excessive number of half-trained and ill-paid judges, and thereby made corruption certain; and the disappearance of most of the judges, while it involved but a small loss of judicial strength, made reconstruction easier.

At the head of the Legal Administration there has been a Senior Judicial Officer, who has had a double function. On the one hand, he has taken the place of the Ottoman Ministry of Justice, and exercised administrative control over all the Courts and Land Registries—(for land registration has been included in the work of the legal department)—and has issued rules of Court, made appointments of Judicial and subordinate officials, directed the internal working and economy of the Courts, and regulated the profession of advocates. On the other hand, he has acted as legal adviser to the Chief Administrator and the different departments of the Administration, drafting decrees and ordinances, and giving opinions on the diverse questions of international, military and civil law which arise out of the delicate position of an occupant governing a country. He has combined, in fact, the functions of a Minister of Justice and of the Attorney-General. The original Senior Judicial Officer in Palestine was Lieut-Col. Orme-Clarke, who, prior to the outbreak of war, had been for a time adviser to the Ottoman Ministry of Justice in Constantinople; and it is to his wide legal knowledge and remarkable administrative ability that the reform of the Ottoman

system and the foundation of British Justice in the country are due. The Senior Judicial Officer has been assisted by seven British Judicial Officers, who preside over the Higher Courts and have a general administrative control over the district tribunals; and by an officer acting as Director of Public Prosecution, who supervises the working of the criminal courts and the prosecution of the more serious offences.

The Courts of Justice were not fully re-established till June 1918. Up to that time urgent criminal and civil work had been disposed of by a few magistrates, who had formerly been Turkish officials and had escaped deportation. The Turkish system provided for a Court of First Instance, composed of three judges, in each Kaza, or district; and in each Sanjak, or province, there was a Court of Appeal composed of five or more members. The territory under our administration comprised three Ottoman Sanjaks, Jerusalem, Nablus, and Acre; and in that area there were three Courts of Appeal and thirteen Courts of First Instance. The Turkish idea was that there was security in numbers, and that corruption was more easily checked if there were several judges to bribe. We have chosen to find the security for justice in the British control and inspection of the system, while leaving the local Courts in the hands of judges of the country.

The single-judge Court has become the basis of the provincial system. The Ottoman Government shortly before the outbreak of war was introducing judicial reform on those lines, and we have applied the Ottoman Justice of the Peace law which was passed in 1913, but had only been brought into operation in a few places in Palestine. Under this law a Palestine magistrate has been appointed in each district, and in the busier districts two or more magistrates, who have power in criminal cases to try all contraventions and the greater number of misdemeanours, and in civil matters to try all cases where the value of the subject-matter does not exceed £50. Courts of First Instance were re-established at Jerusalem and Jaffa in the original occupied territory; and subsequently, when the occupied territory was extended in October 1918, at Haifa, Nablus and Galilee. Originally composed of a British President with two Palestine members,

in the growing difficulty of finding trustworthy magistrates for the local Courts, it was found necessary to provide that the British Judge could either sit alone or call in a Palestine member, if he thought fit. A Court of First Instance, on the criminal side of its jurisdiction, tries certain misdemeanours which are not within the competence of the Magistrate's Court, such as forgery, obtaining money by false pretences, and adultery. But it has become primarily an Appellate Court, hearing appeals from the Magistrate in any case where sentence of imprisonment of more than a month has been passed. On its civil side, it hears in the first instance cases where the value of the subject-matter exceeds £50, and appeals in all cases tried by the Magistrate where the value of the judgment exceeds £10. One Court of Appeal has been constituted for the whole of Palestine in place of the three courts which existed under the Turkish regime. In addition to hearing appeals in all cases from the Courts of First Instance, and in actions concerning the possession of land from the magistrates' court, it acts as a Court of Assize for the trial of "crimes," in the French sense; that is, offences punishable with death or penal servitude. The Court is composed of a British President and a British Vice-President sitting in either case with two Palestine members; and it is now constituted in two chambers. The Ottoman Law of Procedure prescribes a Court of five members for the trial of crime. We have been content with a Court of three, except only in a case for which the death penalty may be inflicted, when it sits with four members, and cannot pass the capital sentence unless there is a majority. The Court travels round the country in a regular monthly circuit and tries the crimes in the district where they were committed. It has made criminal justice, which was notoriously halting and uncertain in the Ottoman regime, almost a model of expedition and certainty. It is very unusual for an accused person to be kept in detention as much as two months, and in several cases a murderer has been convicted within a week of the commission of the crime.

The Turkish system provided for recourse to the Court of Cassation at Constantinople on a point of law from every judgment

not only of the Court of Appeal but also of the Magistrates' Court. From this recourse, which had become a regular device for suspending the execution of judgment for an indefinite period, the administration has been relieved, because communication with Constantinople was cut off. The judgment of the Court of Appeal in a civil case is final; in a criminal case it is subject only to the power of the Chief Administrator, on the advice of the Senior Judicial Officer, to quash or reduce a sentence if there appears to have been a miscarriage of justice. The power is exercised, in much the same way as the Home Secretary in England exercises the prerogative of mercy, after consultation with the British judge who presided over the trial. Sentence of death requires the confirmation of the Commander-in-Chief, who is the fountain-head of justice as of every other department of Government throughout occupied territory.

The British provisional administration has been relieved also of another grave incumbrance upon the equal and expeditious administration of justice. The Ottoman Government, anticipating the declaration of war with the Allied Powers, had, in the autumn of 1914, declared the capitulations with the European States abolished. For three years prior to the occupation, they had dispensed with the Mixed tribunals and the Consular jurisdictions which existed under the Capitulatory regime. We found, therefore, Palestine in the enjoyment of a unified jurisdiction; and for some time no Consuls of the Allies returned. Great Britain and the other Allied Powers had not indeed recognised the abolition of the Capitulations; but the *fait accompli* together with the overriding military necessity justified the maintenance of the situation which we found in the country. It was actually impossible to re-establish the old capitulatory regime, and the proclamation reconstituting the Courts declared that they would be "of *general* jurisdiction." Accordingly the Courts, both Civil and Criminal, have regularly tried all persons without regard to nationality. The only persons not amenable to their jurisdiction have been members of the Army of Occupation, who are tried by Military Courts.

Recognising, however, the practical advisability of trying

foreign subjects by a Court with a British element, special rules of Court have been issued, providing that a person claiming to be a foreign subject should be tried for any offence more serious than a "contravention" either by a British magistrate or by a Court with a majority of British judges, and, like all other persons, he can have his civil suit heard on appeal by a Court with a British member. Consuls of the Allied countries returned later to the occupied territory, but they have not resumed any part of their judicial function. It was provided that the Civil Courts should have jurisdiction in matters of personal statute of foreign subjects (which were formerly dealt with by the Consuls), subject only to the conditions that (1) they should apply the national law of the parties, and (2) they could not grant divorce. This jurisdiction of the Civil Courts has been exercised by the British judges, who have dealt with cases of succession and marriage, etc., of subjects of all nationalities.

On the other hand, the Civil Courts did not and do not deal with questions of the family law of Ottoman subjects, which, as in Egypt, were left to the regulation of the religious law administered by special religious Courts. The jurisdiction of the Moslem, Christian, and Jewish Courts in matters of personal status of Ottoman subjects has been left intact, with only one modification, viz. that when the parties belong to different communities and will not consent to the jurisdiction of a Religious Court, they may bring their suit before the Civil Court. That faculty has afforded a solution for what was a hopeless tangle of jurisdiction, and provides an indication of the lines of development to be followed when a civil administration is set up. A new Religious Court of Appeal from the Moslem Religious Tribunals had to be formed to take the place of the revision by the Sheik-el-Islam at Constantinople which, like the recourse to the Court of Cassation, was barred by the circumstances of Occupation. A Court of three Kadis was constituted at Jerusalem under the Presidency of the Grand Mufti—(the head of the Moslem community)—and a simple procedure prescribed for appeals.

Besides reviving the Civil Courts, the Occupied Territory Administration maintained, in virtue of the existence of martial

law, a series of military courts which, however, were restricted to the trial of offences against the personnel or property of the Army, or against proclamations or ordinances issued by the Administration to protect the Army or public safety. The Commander-in-Chief has power to issue such orders in occupied territory and to delegate the right to the Chief Administrator. The Military Courts were composed of British officers, sitting alone in cases punishable up to six months' imprisonment, and in a court of three where a higher penalty was required; and following the procedure of military law. Their jurisdiction was in practice somewhat wide, because the requirements of public safety received a liberal interpretation. Military occupation extending over two years was hardly contemplated by the laws and usages of war; and during the last year the occupant has been preparing for a more definite succession to the country. Thus, besides orders forbidding the carrying of firearms, possession of Government property and communication with the enemy territory, which were required while military operations were being waged, notices have been issued concerning the currency, prices of food, public health and sanitation, cruelty to animals, cutting down trees, the restriction on the raising of rents and the preservation of antiquities, all of which have been enforced by the military magistrate.

At the same time the substance of the law of the country has been amended only in a very slight measure. A law passed by the Ottoman Government during the war, which discriminated against Allied subjects and made them incapable of suing in the Courts, or of recovering any interest on their debts during the period of the war, was declared to be null and void, because this was clearly an act of war and not in accordance with international law. Something, too, has been done to make punishments more humane, (1) by abolishing minimum penalties that are prescribed by the Ottoman penal code, and (2) by increasing the discretion which a judge may exercise in the case of a juvenile offender in order to keep him out of prison. It is noteworthy, too, that the administration, with the assistance of the American Red Cross Commission, instituted at Jerusalem a boys' reformatory, to which

juvenile criminals are committed for from three to five years. They are instructed in agriculture and technical work, and the accommodation of the institution is already strained to the utmost.

While the substantive law has been little affected, greater latitude has been taken with the amendment of the procedure. The Ottoman codes of procedure are rather slavish imitations of the French codes, and are not calculated to secure expeditious justice. In criminal matters certain features of English practice have been introduced. Witnesses at the investigation are examined in the presence of the accused, and a confession, in order to be admissible as evidence, must be proved to have been made voluntarily. On the civil side " opposition," that is, the demand to have a re-trial of a judgment given by default—which has become a means for delaying justice—is only allowed if the claimant proves a sufficient reason for his absence; witnesses are summoned by a process of the Court instead of it being left to the parties to bring them; and commercial suits have been handed over to the same Courts as try other civil suits, instead of being dealt with by specially constituted tribunals.

One large class of civil cases has so far been withdrawn from the Courts. By the Proclamation re-establishing the Courts no action concerning the ownership of land can be heard, and no judgment can be given for execution upon immovable property. The Courts can only deal with actions concerning possessory rights. Land transactions had to be prohibited for a time because the Turks, as has been mentioned, carried away the Land Registers through which all dealings had legally to pass. The Registers were recovered after the fall of Damascus, and have been brought back to the districts to which they belong; but the prohibition has been maintained to the present time for various reasons. Again, the Turkish will to hamper has really assisted the Administration, which was anxious to control dealings in land and to prevent private speculation pending a land settlement, which it will be one of the first tasks of the Civil Government to initiate. To facilitate the carrying out of this land settlement a system of registration of title on the lines of the Torrens System has been

prepared to replace the cumbrous and corrupt Ottoman methods. The Land Settlement will accompany a cadastral survey which it is also intended to initiate as soon as the future of the country is determined.

There are one or two special incidents of interest in regard to jurisdiction which may be mentioned. Besides Palestine, there are three other divisions of Occupied Enemy Territory in Syria, known respectively as O.E.T. North, West and East, which are under the administration of the French and the Hedjaz Governments. For legal purposes they have been separate jurisdictions, but as they are equally parts of the former Ottoman Empire, and equally under the Allied Military Occupation, arrangements have been made for the reciprocal service of processes, execution of judgments, and arrest of fugitive criminals. A warrant of arrest to be executed in another Occupied Territory is accompanied by a summary of the evidence against the person wanted; a judgment is accompanied by a certificate of a President of the Court of Appeal that it is final and fit for execution; a process coming from another Occupied Territory is served in the same way as one issuing from the local Courts themselves. As regards the judgments of Courts outside the Occupied Territory, the English rule has been adopted that a fresh action is to be brought on the judgment, which is accepted as sufficient proof of the debt unless the defendant can show that there was no jurisdiction.

The Courts have had to assume certain functions which normally are exercised by a Department of the Executive, because, in the military administration of a province, certain parts of the Central Government cannot reasonably be reproduced. Thus the registration of companies and partnerships, the authorisation of new trading corporations, and the registration of copyrights and trade-marks already granted in other countries, have been carried out provisionally through the Courts. The existing Ottoman law has been followed in regard to the conditions of admitting companies and granting exclusive privileges; and it has been laid down that no new trade-marks or patents can be granted, because that would amount to an exercise of sovereign power which is beyond the competence of the temporary Military

Administration. For the same reason the Administration has refused to grant any concessions or to complete any which had been applied for from the Ottoman regime, but not actually granted. In this, as in other respects, the Military Administration has shown a more loyal respect for the Ottoman law than the Ottoman Government ever did; it has, in fact, endeavoured as far as possible to set up the rule of law as faithfully as if it were applying the Common Law of England.

The figures of the cases tried and of the receipts from the Courts are a remarkable proof of the growing confidence in the administration of justice under the British control. The Magistrates' Courts try over 2000 civil cases, and about 1500 criminal cases each month. And the Courts this year have been practically self-supporting. What has helped considerably to bring the Courts nearer to the people is that we have made the languages of the people—Arabic, and in the case of Jews, Hebrew, —the languages of the Courts, while in the Turkish time many of the proceedings and records were kept in Turkish, which was only known to the official class. All public notices and proclamations are issued in the three languages—English, which is the language of the Administration, Arabic, and Hebrew—and all processes of the Courts are likewise published in the three.

Much, indeed, remains to be done by a Civil Government before the Administration of Justice in Palestine can be thoroughly reformed. The present codes will require remodelling; the judicial organisation must be further overhauled, and a proper system of legal education to train up magistrates and advocates learned in the law and upright in character must be established. But not only have the lines of reform been made plain by the experience of the last two years, but some essential changes have been brought about and the ground has been prepared for laying the foundation of British Justice.

SUBMARINE WARFARE

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A DISTINGUISHED British Naval Officer who had unrivalled sources of information in regard to the submarine campaign of the Germans during the late war has recently stated that it "provided perhaps the finest vindication of International Law in history." [1] This apparently paradoxical statement requires explanation, since almost from the beginning of the war writers were constantly referring to "problems" raised by submarine warfare. Submarine warfare does raise certain problems; but, in my opinion, these problems can be dealt with and solutions provided by applying principles which, until the late war, were of general acceptance. Neutrals in the long run were, or ought to have been, the guardians of the Law of Nations; in the future such guardianship and enforcement must lie with the League of Nations. In the past the duty has not been fulfilled as it ought to have been; sometimes because of the difficulties in stating what the law was, sometimes by reason of the violations not being of a sufficiently flagrant character to call forth the strong moral reprobation of mankind. Property and life do not stand on the same plane, technical rules relating to the former have been violated, on occasion, by belligerents with comparative impunity. Human beings are, of course, agents through whom States conduct their warlike operations; but the taking of life in war has been regulated by customary and conventional rules, and so long as these were observed in principle, the neutral could say or do nothing. But when the

[1] Rear-Admiral S. S. Hall, C.B., in Vol. V. of the *Transactions of the Grotius Society* (1919), p. 84.

humane principles which underlie the gradual evolution of the laws of war were violated in a wholesale manner and in such a way as to jeopardise friend and foe alike, neutrals have come forward in defence of the law against the law-breaking State.

The view which will be put forward in the following pages is that the advent of the submarine does not require the making of new laws, that the old rules are sufficient, but need rigid enforcement. It is proposed therefore to discuss the rules of naval warfare as they had been received by the customary Law of Nations regarding the functions and duties of surface warships; to consider their application to submarines, and to examine some of the contentions advanced by the German apologists for the unrestricted use of submarines.

I

The submarine had for some time before the outbreak of the late war formed an integral part of the naval forces of many States, it is one of the vessels used for military offensive purposes and comes under the general term of a "ship of war." The functions and duties of ships of war in belligerent operations had been settled by the customary Law of Nations, and it will be well, therefore, to state concisely what those were before considering the particular problems which submersible warships raise.

All enemy warships may be at once attacked without any preliminary visit or demand for surrender; they may, of course, defend themselves. Submarines may therefore attack warships and be themselves attacked by them without preliminary warning.

Enemy merchant ships, with certain exceptions, are liable to capture and condemnation, but a belligerent is under a duty recognised by International Law, before attacking her, to visit or to attempt to visit a merchant ship in order to ascertain her character and whether she is in fact liable to capture. Merchant vessels may attempt flight or resist visit, as visit is

the first act of capture; if they do so they may be compelled by force to surrender. They may be armed in self-defence. When resistance has ceased or the vessel has hauled down her colours she is captured as a prize. It is the duty of the captor to make all reasonable efforts to save all on board. The crew on surrendering become prisoners of war and must be treated with humanity. By the 11th Hague Convention, 1907, they are entitled to be released if they give a written promise not to engage in any service connected with the operations of war while hostilities last. Captured merchant ships should be taken into a port of the captor and proceedings in prize taken for their condemnation. It is a point not free from doubt as to the moment when the property in the captured merchant ship passes to the captor. In my opinion the property of the original owner is not fully divested until there has been a condemnation by a regular prize tribunal having jurisdiction of the case. Condemnation acts retrospectively to the moment of capture.[1]

The subject of the resistance of enemy merchant ships may be elaborated rather more fully. The master of a belligerent merchant ship seeing a suspicious vessel might either decide to attempt escape by flight or continue his voyage and wait till summoned to surrender, or he might decide to resist. The latter decision would be conditioned by the type of enemy warship whose approach he was awaiting; if the merchant captain considered his chances favourable he would wait till some offensive act was done by the enemy, and an attempt by the latter to visit was the first step towards capture.[2] The possibility that a merchant ship might carry guns and resist was always present in the old wars to the minds of captains of warships and privateers, but it was never suggested that the latter were entitled without warning to open fire with heavy guns, or in modern times with torpedoes, merely because of the possibility of finding on closer approach that the enemy merchant ship was armed. The warship was not allowed to make the

[1] For authorities see W. E. Hall, *International Law*, 7th ed., p. 491.

[2] Dr. Hans Wehberg, *Das Seekriegsrecht* (1915), p. 285.

merchantman's possible strength the excuse for a surprise attack, or for sinking at sight.

Captured enemy merchant ships may, however, be destroyed under certain conditions—the unseaworthiness of the prize or the commander's inability to spare a prize crew are given as the examples of justification in Article 303 of the British Naval Prize Manual (Holland's ed. 1888). The Institute of International Law in 1882 gave the following as good grounds for allowing such destruction : (1) When it is not possible to keep the vessel afloat owing to her bad condition and the rough state of the weather; (2) When the vessel cannot keep up with the warship and might easily be recaptured by the enemy; (3) When the approach of a superior enemy force creates fear of recapture; (4) When the captor cannot put on board an adequate prize crew without reducing his own beyond what is essential for his own safety; (5) When the port to which it would be possible to take the captured vessel is too distant.[1]

Systematic destruction of enemy's vessels has been rare in the past, but it was ordered by the American Government during the war of 1812–1814,[2] and Dr. Lushington during the Crimean War said that it may be justifiable or even praiseworthy in the captors to destroy an enemy's vessel, and that the bringing to adjudication of an enemy's vessel is not called for by any respect to the right of the enemy proprietor where there is no neutral property on board.[3] Russia, during the war with Japan, sank twenty-one Japanese vessels captured as prizes, and during the early stages of the late war the German cruisers, *Emden*, *Karlsruhe* and *Kronprinz Wilhelm*, finding themselves unable to spare prize crews, sank numerous captured British vessels after first removing crews and passengers, as also did the *Moewe* later on.

In order that discipline may be maintained and reasons for destruction reduced, many States require that proceedings for condemnation in their Prize Courts shall be taken in respect of destroyed enemy ships, but as regards the legitimacy of

[1] *Ann. de l'Institut de Droit International*, VI. 221.

[2] Hall, *International Law*, § 150.

[3] *The Leucade* (1855), Spinks, 217.

destruction of enemy merchant ships, under certain conditions, there can be no dispute.

The British Prize Rules provide that on a decree of condemnation of a ship that has been destroyed the Order of the Court declares that the destruction of the ship was necessary and the grounds on which the Court held the destruction to have been justified. Several cases occurred in British Prize Courts during the war, *e. g.* the German steamships *Baden* and *Santa Isabella* which were sunk in the course of the operations off the Falkland Islands.

Destruction of enemy vessels under certain conditions being recognised as legitimate, it is also a rule of International Law that the crew, passengers, and, if possible, the cargo together with relevant papers and documents must be first removed and placed in safety.

This rule has been introduced and observed by the traditions of all seafaring people until the present War. It is for the protection of the lives of all on board merchant vessels, whether enemies or neutrals. It was expressly laid down in the Rules for Naval Warfare adopted by the Institute of International Law at its meeting in 1913 that, " before destruction, persons on board are to be placed in safety." [1] The British Naval Prize Manual (1888) Article 304, the French Instructions of 1912,[2] the German Naval Prize Regulations, 1914,[3] the Italian Naval Prize Regulations, to mention only a few, are equally specific. But more important than these is the provision in Article 3 of the 6th Hague Convention, 1907, which gives permission to a belligerent to destroy, subject to an indemnity, enemy merchant ships met at sea which are ignorant of the outbreak of war; in case of destruction it is expressly stated that it is " under the obligation of providing for the safety of the persons as well as the preservation of the papers on board." The official report of the Comité d'Examen at the Hague discloses the fact, also mentioned in the Report of M. Fromageot to the Plenary Meeting of the Conference on September 27, 1907, that Baron Charles de Macchio, the Second Delegate Plenipo-

[1] *Annuaire*, XXVI. p. 669. [2] Art. 28, §§ 153, 154. [3] Art. 116.

tentiary of Austria-Hungary insisted on the insertion in the Article of a provision for the security of passengers and crew and the preservation of the papers.[1]

When, during the American War of Independence, Paul Jones sank captured ships he removed all persons on board before destroying them; and Captain Semmes of the *Alabama*, during the American Civil War, either placed in safety persons on board ships he was about to destroy or released the ship when he found it impossible to accommodate them. Mr. J. A. Bollas, the Solicitor to the United States Navy, examined all the charges of cruelty brought against Captain Semmes, and in no case did he find any evidence that he had inflicted unavoidable hardship on those he captured.[2]

Whether attempted visit of an enemy vessel is necessary before attack may not be so easily capable of proof from Naval Instructions, as is the rule of preservation of the lives of those on board; also, the taking in for adjudication of enemy merchant ships may not be required by the regulations of all countries; but visit or summons to surrender has been hitherto universally regarded as necessary prior to attack as a means of avoiding bloodshed of non-combatants and in order to give effect to certain recognised exemptions from capture. To put the matter in another way, to attack a merchant ship, without warning, by gunfire—*a fortiori* by a torpedo, has hitherto been recognised as illegitimate. In this connection the following observations of Lord Stowell on the use of false colours by a privateer may be cited. He said: "To sail and chase under false colours may be an allowable stratagem of war, but firing under false colours is what the maritime law of this country does not permit; for it may be attended with very unjust consequences; it may occasion the loss of the lives of persons who, if they were apprised of the real character of the cruiser, might, instead of resisting, implore protection."[3] Ample warning is essential before destruction of the ship is resorted to, and sufficient time

[1] *Actes et Documents*, I. 255; III. 955.
[2] See J. W. Garner, *American Journal of International Law*, IX. p. 614.
[3] *The Peacock*, 4 C. Rob., 185.

allowed for the purpose of transshipment. A captor cannot be relieved of this obligation even though his position would be seriously endangered through the sudden approach of superior enemy forces.

Neutral merchant ships are liable to visit and search in time of war by belligerent warships and they are under a duty to submit. No attack on a neutral ship is lawful except where the vessel attempts to avoid visit and search or forcibly resists, and such attack must only be proportionate to what is requisite for obtaining the exercise of this right, and must cease when the vessel stops or ceases to resist. Forcible resistance to visit and search entails capture and condemnation of the neutral ship.[1]

A neutral merchant ship is also liable to capture if engaged in the carriage of contraband, or analogues of contraband, attempting to break blockade or in performing acts of unneutral service.

Until the Russo-Japanese War instances of the destruction of neutral merchant ships are rare. According to the practice of the English Prize Courts the destruction of neutral vessels entailed a liability to compensation on the part of the destroyer.[2] Compensation is, however, possibly not due if the vessel is clearly liable to condemnation, but this point is not free from doubt. The British Naval Prize Manual (1888 ed.) provides that if the captured vessel is not in a condition to be sent into any port for adjudication, or if the commander is unable to spare a prize crew, he should release the vessel and cargo without ransom, unless there is clear proof that she belongs to the enemy (Article 303). The Russian practice during the Russo-Japanese War called forth effective protests from Great Britain. The doctrine of many States, however, as evidenced by the Memoranda prepared for and by discussions at the Hague and London Naval Conferences, showed that the British view was not generally accepted. The compromise embodied in Chapter IV of the Declaration of London laid down the rule that a neutral vessel which has been captured may not be destroyed by the captor, but must be sent into a port for adjudication. It

[1] *The Maria*, 1 C. Rob., 369.
[2] *The Actæon*, 2 Dod., 48; *The Felicity*, 2 Dod., 381.

provides, however, that, as an exception, a captured neutral vessel may be destroyed : (1) if she would be liable to condemnation, and (2) if the taking in of the vessel would involve danger to the safety of the warship or the success of the operation in which she was engaged (Article 48). This does not appear to be a very satisfactory compromise, as the captor is judge both of the liability to condemnation and of the military necessity. It may be going too far to say that under no circumstances is it ever lawful to destroy a neutral vessel, but the view may be maintained that in every case where a neutral ship is destroyed before adjudication by a Prize Court the owner should be entitled to compensation, except possibly where such vessel was liable to condemnation as being in effect an enemy ship.

As the lives of persons on board captured enemy ships must be saved before the vessel is destroyed, *a fortiori* must they be in the case of destruction of neutral ships. Article 50 of the Declaration of London recognised this and provided that before destruction all persons on board must be placed in safety, and all the ship's papers and other documents must be taken on board the warship. It will be seen that a distinction appears to be made between persons and papers; the former are to be placed " in safety " while the ship's papers are to be taken on board the warship.

II

In a Declaration presented to the Governments of a number of neutral countries by Sir Edward Grey on March 1, 1915, after enumerating the duties of a warship in attacks on commercial vessels, it was stated that " A German Submarine, however, fulfils none of these obligations. She enjoys no local command of the waters in which she operates. She does not take her captures within the jurisdiction of a Prize Court. She carries no prize crew which she can put on board a prize. She uses no effective means of discriminating between a neutral and an enemy vessel. She does not receive on board for safety the crew of the vessel she sinks. Her methods of warfare are

therefore entirely outside the scope of any of the international instruments regulating operations against commerce in time of war." [1]

These views were re-echoed by Mr. Bryan, the United States Secretary of State, in a dispatch to the American Ambassador in Berlin, dated May 13, 1915 : " The Government of the United States, therefore, desires to call the attention of the Imperial German Government with the utmost earnestness to the fact that the objection to their present method of attack against the trade of their enemies lies in the practical impossibility of employing submarines in the destruction of commerce without disregarding those rules of fairness, reason, justice and humanity which all modern opinion regards as imperative. It is practically impossible for the officers of a submarine to visit a merchantman at sea and examine her papers or cargo. It is practically impossible for them to make a prize of her without leaving her crew and all on board of her to the mercy of the sea in her small boats. These facts, it is understood, the Imperial German Government frankly admit. We are informed that in the instances of which we have spoken time enough for even that poor measure of safety was not given, and in at least two of the cases cited not so much as a warning was received. Manifestly submarines cannot be used against merchantmen, as the last few weeks have shown, without an inevitable violation of many sacred principles of justice and humanity." [2]

Most of the foregoing defects are inherent in the submarine torpedo-boat in attacks against commerce, but they are not all of equal legal importance. The chief defect is due to the non-provision for the safety of persons removed from destroyed ships, and the fact that a submarine cannot take a captured ship in for adjudication, but must in all, and not merely in exceptional cases, resort to destruction. The destruction of captured enemy merchant ships, as has already been pointed out, is not in all cases an illegitimate act of war.

[1] *Parliamentary Papers*, No. 6 (1915), p. 23.

[2] Special Supplement to *American Journal of International Law*, Vol. IX. July 1915, p. 131.

The assurances given by Germany to the United States on May 4, 1916 (the withdrawal of which on January 31, 1917, led to the severing of diplomatic relations by the United States on February 3, 1917), contained the following statement of the orders which had been issued to the German naval forces. It showed that Germany recognised that by International Law enemy merchantmen are entitled to receive the hitherto accepted rights in relation to visit and search both from submarines as well as from surface warships : " In accordance with the general principles of visit and search and destruction of merchant vessels recognised by International Law, such vessels, both within and without the area declared as naval war zones shall not be sunk without warning and without saving human lives, unless such ships attempt to escape or offer resistance." [1]

The United States, in reply to this communication, having had experience of the duplicity of the German Foreign Office, felt " it necessary to state that it takes it for granted that the Imperial German Government does not intend to imply that the maintenance of its newly announced policy is in any way contingent upon the course or result of diplomatic negotiations between the Government of the United States and any other belligerent Government, notwithstanding the fact that certain passages in the Imperial Government's Note of the 4th instant might appear to be susceptible of that construction. In order, however, to avoid any possible misunderstanding, the Government of the United States notifies the Imperial Government that it cannot for a moment entertain, much less discuss, a suggestion that respect by German naval authorities for the rights of citizens of the United States upon the high seas, should in any way or in the slightest degree be made contingent upon the conduct of any other Government affecting the rights of neutrals and combatants. Responsibility in such matters is single, not joint, absolute, nor relative."

No reply was made to this Note by Germany.[2]

[1] Special Supplement to the *American Journal of International Law*, Vol. XI. October 1917, p. 336.

[2] *Ibid.*, cited *supra*, pp. 336–7.

III

It may be as well now to turn to some of the arguments advanced by or on behalf of the German methods.

It was contended by Germany (*a*) that the introduction of new weapons and new conditions of warfare demands the modification or alteration of the old rules.[1] During the war the Allies made use of the argument of altered conditions of warfare as justification for certain of their methods of dealing with enemy commerce, but they also contended, with good reason, that there was no change in the principles involved. Whatever may be the objections raised by enemies or neutrals to British and Allied practices, whether in relation to visit and search, blockade or contraband, none of them violated the rules of justice and humanity hitherto regarded as universally obligatory. The claim of the Germans on this head cannot be substantiated; the rules of naval warfare above stated have stood the test of other important alterations in the modes of naval warfare. The introduction of steam and other means of propulsion did not modify these rules. When torpedoes came into general use and fast torpedo-boats were built, it was feared in some quarters that their speed and the nature of their armament would induce a practice similar to the German practice of sinking at sight. On this point Admiral Bourgeois of the French Navy wrote in 1886 : " The advent of the torpedo, whatever its influence on naval *matériel*, has in no way changed international treaties, the Law of Nations or the moral laws which govern the world. It has not given the belligerent the right of life and death over the peaceable citizens of the enemy or neutral state." [2] This observation applies equally to the submarine torpedo-boat as to the surface warship.

(*b*) Furthermore, the claim that the comparatively fragile character of the submarine renders the exercise of the right of visit and search or of the summons to surrender dangerous

[1] I have dealt with some of the arguments here discussed in my *Defensively-armed Merchant Ships and Submarine Warfare* (1917).

[2] *Nouvelle revue* (1886), II. 499.

and is a reason for their non-compliance with the rule in this respect is contrary to the hitherto accepted principles of war. If a belligerent uses force against his adversary's commerce it is his duty to see that it is strong enough for the purpose, and capable of conforming to the humane rules adopted in naval warfare; it is not for him to complain if his weapon turns out to be too feeble for the purpose for which it was employed. The attempt to change existing rules to the advantage of the party that is not in command of the surface of the sea, is an attempt to avoid the consequence of naval weakness. War is not conducted on the analogy of handicapping rules at race meetings. The limitations which are inherent to the submarine cannot be appealed to in order to justify its success. New weapons are illegitimate if their use necessarily entails violation of fundamental principles.

(*c*) It was also urged that the prohibition of the arming of merchant ships would enable a submarine to operate against commerce without violating the laws of war. The legitimacy of defensively arming merchant ships is not disputed by any Power, so far as I am aware, except Germany, and to give up the practice would deprive a merchant vessel of a means of protecting the lives of the passengers and crew, and would also increase the effectiveness of the submarine. In short, all that a State would require in war against commerce would be a fleet of fast vessels armed with signalling guns if defensive armament of merchant ships were abandoned.[1]

(*d*) With a view to render rarer, or to prevent the destruction of prizes, Article 23 of the 13th Hague Convention, 1907, provides that a neutral Power may allow prizes to enter its ports and roadsteads when they are brought there to be sequestrated pending the decision of a Prize Court. Great Britain has not ratified this Convention, and in signing the Convention excluded this Article; the United States, Japan and Siam on ratifying the Convention also excluded it. The Article does not impose on neutral States a duty of reception of prizes into their ports. Since Great Britain and the other Powers mentioned refused

[1] See my *Defensively-armed Merchant Ships and Submarine Warfare*, p. 26.

to agree to this principle for warships generally, an exception on behalf of the submarine should not be entertained.

(*e*) The policy of unrestricted submarine warfare introduced by Germany in February, 1917, purported to be by way of reprisals for British illegalities; but even if the latter were admitted, German practices went beyond anything hitherto known under the head of reprisals, and for the purpose of this paper in relation to submarine warfare in general they need not be discussed in detail. It is enough to say that no reprisals directed against enemy and neutral ships alike can be permitted which violate fundamental laws of humanity involving the certainty of death or mutilation to non-combatants, neutral as well as enemy. This was the view taken by the United States in the Dispatch of February 3, 1917, severing diplomatic relations with Germany.[1]

(*f*) One of the arguments used by Germany in controversy with the United States, who protested against attacks on merchant vessels flying a neutral flag, was that in consequence of the " misuse " of neutral flags by the British merchant ships there was no certainty that a vessel showing the flag of a neutral was not a defensively-armed enemy merchant ship, and that any attempt to visit such a ship would render the submarine liable to destruction.

This was an attempt to cast doubts upon a *ruse de guerre* of long standing in naval warfare. Arising from a certain anxiety that the policy of a general use of the flag of the United States by British merchant ships might imperil the lives and property of their citizens, the United States Government expressed a hope that the use of their flag in the German war zone might be checked,[2] but Sir Edward Grey replied that this ruse of employing false colours had always hitherto been permitted and that United States vessels had availed themselves of this facility during the American Civil War,[3] and that the British Government had no intention of advising their merchant shipping to use foreign

[1] Supplement to *American Journal of International Law*, cited *supra*, p. 337.
[2] *Parliamentary Papers*, Misc. No. 6 (1915), p. 16.
[3] *Ibid.*, p. 21.

flags as a general practice or to resort to them otherwise than for escaping capture or destruction. A distinguished German Jurist, Dr. Perels, admits the legitimacy of this *ruse de guerre*,[1] and though the abolition of the rule has been advocated,[2] the customary Law of Nations permitted it both to warships and merchant ships.

This argument was an attempt to excuse the submarines from complying with the duty of ascertaining the nationality and character of the ship before capturing or destroying it. " If that obligation is fulfilled," said Sir Edward Grey in the dispatch above referred to, " hoisting a neutral flag on board a British vessel cannot possibly endanger neutral shipping." Prof. Dupuis had some years ago pointed out that the indiscriminate destruction of enemy ships without visit and search must inevitably involve, on occasion, the destruction of neutrals; flags, he said, are no necessary criteria of nationality, and the usages of the sea admit of enemy merchant ships flying neutral flags: visit and search are necessary to ascertain the nationality of a merchant ship.[3]

Attacks without warning by submarines have shown, even on the most favourable assumption, that the imperfect and limited vision from the vessel have led to mistakes being made and neutral vessels being sunk. In the case of the (neutral) American vessel, the *Gulflight*, " the American flag was first observed at the moment of firing the shot "; in the case of another (neutral) American, the *Nebraskan*, " in the twilight which had already set in, the name of the steamer was not visible from the submarine," and the excuse made by the German Government for an attack without warning on the Cunard steamer *Orduna* was the difficulty of observation, caused by the unfavourable weather.[4] These difficulties appear to be inherent to the nature of the submarine, so that even in the case of a belligerent whose good faith is irreproachable, mistakes would certainly be made

[1] *Das internationale öffentliche Seerecht*, § 35.
[2] *U.S. Naval War College, International Law Discussions*, 1903, pp. 37–42.
[3] *Le droit de la guerre maritime* (1899), p. 350.
[4] See my *Defensively-armed Merchant Ships*, p. 32.

if sinking at sight were permissible. The treacherous belligerent can also by means of the torpedo and submarine adopt the policy of sinking "without leaving a trace," a policy which, though not impossible in the case of surface vessels, is less likely to be adopted by them.

IV

As regards the future of submarines, it is certainly possible to construct submarines sufficiently large and strong to act as surface warships have acted and to conform to the traditional practice of commerce destroyers. Cruiser warfare by submarines armed with guns, and large enough to carry spare men for prize crews, can be built and are capable of a wide range of action.[1]

Whether the abolition of the right of capture of private property at sea would tend to produce a mitigation of the difficulties occasioned by the use of submarines against merchant ships is not in my opinion at all certain, since captures for the carriage of contraband, breach of blockade and unneutral service, etc., would presumably still remain. This question, again, is too wide for discussion in this connection.

It has been suggested that the practice of Ransom or Bonding captured vessels might reduce to a minimum the danger to merchant vessels captured by submarines. Ransom was effected by an agreement made between the commander of the captured vessel or cargo, and the captor, by which the latter permits the former to depart with his vessel and gives him a safe conduct in consideration of a sum of money which the former, in his own name and in the name of the owners of the vessel and cargo, promises to pay at a future time named. The contract was in writing in duplicate, one copy being kept by the captor which was the Ransom-Bill proper, the other copy being kept by the master of the captured vessel which acted as a safe-conduct. The practice of ransom has not been viewed with favour by Great Britain, owing probably to her naval superiority in the past which

[1] See Rear-Admiral S. S. Hall's paper in *Transactions of the Grotius Society* (1919), p. 86.

generally enabled her fleets to protect her commerce, and owing to the fact that it was considered that the permission to ransom a ship tended to relax the energy of war, so that merchant vessels would not be so diligent in seeking to escape or resist capture. Statutes of the reign of George III prohibited to British subjects the privilege of ransom unless in cases of extreme necessity to be decided by the Court of Admiralty; and to-day Section 45 of the Naval Prize Act, 1864, while allowing the King in Council to make Orders prohibiting or allowing ransom, provides that Ransom Bills or Bonds given in contravention of any Order in Council shall be deemed to have been given on an illegal consideration, and persons so giving them are liable to a fine of £500. Practice varies in other States, ransom being allowed in some and forbidden in others. The United States has not prohibited their use, and ranks them among the *commercia belli*.[1] Each State decides for itself as a matter of policy the expediency of allowing its merchant vessels to enter into ransom contracts, and the question is not peculiar to submarines except in so far as the submarine is less likely than a surface warship to be able to spare the necessary prize crew to navigate the prize into port. The threat to sink under penalty of an exorbitant ransom would not necessarily be operative in compelling a submarine to conform to the laws of civilised warfare.

The conclusions suggested after the foregoing examination may be summed up shortly by the statement that the introduction of the submarine does not call for the making of new laws for naval warfare, but demands the rigid application of those hitherto accepted. Submarines, whether armed with torpedoes or guns, are legitimate means of attacking warships. The attack on a merchant ship without previous warning is illegal and officers guilty of violating the rule are guilty of a war-crime. Submarines are legitimate means of attacking enemy commerce only if they conform to the laws of naval warfare hitherto observed by surface warships.

The use of torpedoes against merchant ships, on which there

[1] Hall, *International Law*, § 151; Halleck, II. p. 365; Moore's *Digest*, VII. § 1214.

is little or no authority either from Conventions or national prize manuals, though there is no evidence of their use for this purpose until the late war, must be considered in the light of the accepted principle that instruments of war are illegal if they cause superfluous injury.[1] There is a considerable body of opinion against the legality of the employment of torpedoes against merchant ships.[2]

The questions of *ruses de guerre* in naval warfare, such as the use of false flags, decoy ships and disguises must be considered as part of the general laws of naval warfare, as also must the general subject of the taking of prizes by captors into neutral ports.

If the submarine is to receive full recognition as a ship of war for all purposes, the rules applicable to it must be the same as for surface ships. There was a divergence of opinion as to the expediency of continuing to recognise the legitimacy of the use of false flags before the advent of the submarine, and a clear-cut division of opinion between States which recognised or declined to recognise the legitimacy of the taking of prizes into neutral ports to await prize proceedings. It may be that further exploration of these points will result in an agreement.

The German methods of submarine warfare failed partly by reason of the courage, tenacity and ingenuity of the British and Allied seamen of their navies and mercantile marines, partly by the assertion of neutrals of the violated majesty of the Law of Nations. No State can ultimately hope to triumph over the combined world-consciousness of "fairness, reason, justice and humanity." All is not fair in war; in sea warfare as in land warfare, "belligerents have not an unlimited right as to the choice of means for injuring the enemy."[3] *Kriegsräson geht nicht vor Kriegsrecht.*

[1] See *Declaration of St. Petersburg* (1868), *Hague Regulations for Land Warfare* (1907), Art. 23 (e).

[2] See authorities cited by J. W. Garner, *op. cit.*, p. 625.

[3] *Hague Regulations for Land Warfare*, 1907, Art. 22.

THE PEACE TREATY IN ITS EFFECTS ON PRIVATE PROPERTY

By ERNEST J. SCHUSTER, LL.D.

(1)

According to the view generally accepted by modern Continental writers, " war is a relation of State to State and not of individual to individual." It is well known that this theory is not in accordance with the views held by the original authorities on International Law,[1] and that it has never been accepted by English and American jurists.[2] Moreover, the exceptions from the rule, which even the convinced adherents of the doctrine allow, are so numerous and important that they considerably reduce its significance. While, however, the general doctrine of a distinction between the armed forces and the unarmed population is neither valid in theory nor adequately supported by practice, a concession to this doctrine was made with regard to the treatment of private enemy property outside of the actual theatre of war. As mentioned by Hall (*loc. cit.*, p. 434), the only instance of the confiscation of private enemy property situate within the territory of a belligerent power which has occurred since the end of the Napoleonic wars " was supplied by the American Civil War, in which the Congress of the Confederate States enacted that property of whatever nature, except public stocks and securities held by an alien enemy . . .

[1] The sanction given by International Law to acts of violence against civilians and their property is satirised by Voltaire. " Enfin pendant que les deux rois faisaient chanter les ' Te Deum ' . . . il gagna d'abord un village voisin; il était en cendres . . . c'était un village abare que les Bulgares avaient brûlé *selon les lois du droit public.*" (What follows is unquotable.) *Candide,* Chap. III.

[2] For references see Hall, *Intern. Law,* 6th ed., pp. 65, 66; Oppenheim, *Intern. Law,* Vol. II. 2nd ed., p. 64.

shall be sequestrated and appropriated." The same author, though holding that "it cannot be said that a belligerent does a distinctly illegal act in confiscating such personal property of his enemies existing within his jurisdiction as is not secured upon the public faith," is yet of opinion that "the absence of any instance of confiscation in the more recent European wars, no less than the common interests of all nations and present feeling, *warrant a confident hope that the dying right will never again be put in force, and that it will soon be wholly extinguished by disuse.*"

The fact that the hope thus expressed has been entirely frustrated by the events which have happened is not surprising in the light of these events. The experiences of the late war have, in fact, destroyed the last remnant of any foundation for the doctrine alluded to above. In view of the far-reaching destruction of private property in the war regions, the extensive removal of plant and machinery from places occupied by enemy forces, and the havoc caused by submarine and aerial warfare, the confiscation of enemy private property locally situate in the territories of the victorious Powers cannot consistently be objected to on humane or ethical grounds, but it remains to be seen whether the particular measures affecting private property provided for by the Peace Treaty ought to form precedents establishing definite rules of International Law on these matters.

(2)

The Peace Treaty affects private property and rights in a double manner: on the one hand it deprives individuals of property and rights: on the other hand it confers property and rights. The deprivations, as will be shown below, do not merely affect the subjects of the vanquished States, but also the subjects of the victorious States, and some of the benefits do not merely accrue to the former, but also to the latter.

The compensation for damage by German acts of war in the war regions done to the individual subjects of any Allied or Associated Power does not, properly speaking, come within the subject dealt with in this article, inasmuch as the stipulations of

the Peace Treaty providing for this compensation do not confer any direct right on the injured individuals, the right to such compensation, which is limited in the manner mentioned in Arts. 232, 234, 237, being in each case vested in the Government of the State of which the injured individual is a subject; but these stipulations are of interest, as they show for what injuries done to individuals compensation may be claimed. These include : (*a*) damage to civilians killed or injured by acts of war, and to surviving dependents; (*b*) damage caused to civilians by acts of cruelty, violence, or maltreatment (including injuries to life or health as a consequence of imprisonment or deportation, etc.); (*c*) damage done to civilians in occupied areas or to their dependents by acts injurious to health, capacity to work, or honour; (*d*) damage caused by compulsion to underpaid labour; (*e*) damage in respect of property (not being in the nature of naval or military works), caused by acts of war (see Annex I. to Arts. 231–244, Clauses (1) to (3), (8), (9)).

Each Allied or Associated State, as will be seen below, has a charge on German private property situate within its territory, by which charge, in any case, a partial satisfaction of the above-mentioned claims is secured (see Art. 243 (*a*)). (The proprietary rights of any German subject, in respect of certain submarine cables, are also to be applied in part satisfaction of the Reparation Claims (see Annex VII. to the Arts. 231–244).

The parts of the Peace Treaty which in a more direct manner confer rights or impose liabilities on private individuals, are those dealing (*a*) with the payment of debts by or to the subjects of mutually enemy countries; (*b*) with the appropriation for certain specified purposes of German private property situate within the territory of any Allied or Associated Power; (*c*) with the claims of each subject of any Allied or Associated Power in respect of injury inflicted to his pecuniary interests by any German exceptional war measure; (*d*) with the effect of the Peace Treaty on Contracts, Copyright, Patent Rights, Trade Marks and Designs, and similar matters.

(3)

Before, however, dealing with the effect of the Peace Treaty under these heads, it is necessary to describe the condition of things in the economic domain, brought about by the war legislation of the belligerent countries. For the sake of brevity and lucidity I propose in the further course of this article to deal with these matters only in so far as they affect the United Kingdom on the one side and Germany on the other side.

The term " war legislation " is intended to include the common law rules against intercourse with the enemy, as well as the Statute law dealing with the same subject. The various Proclamations and Orders in Council having reference to these matters either formulate the common law rules or exercise power of legislation conferred upon the Crown by Statute; in so far as they are in contradiction with the common law rules or exceed the Statutory power they are of no effect (The *Zamora*, 1916, 2 A.C., 77, 90). The common law rules forbidding intercourse with the enemy, before the present war, were incomplete and not always consistent. The authorities relating to most of them date from times when the conditions of warfare, as shown above, were entirely different from the present conditions, and when, moreover, the methods of transport and intercourse had no similarity to those of the present day. International intercourse before the outbreak of war had become so much more extensive and so much more complicated by combinations of interests spread over various countries that the old rules—the majority of which were laid down in cases arising during the Napoleonic wars—gave very insufficient guidance. It was therefore the business of the Courts to apply the principles of these rules, giving effect at the same time to the modified conditions. It is not within the scope of the present article to deal with the important new case law which has thus sprung up on the subject of the effect of war—during the progress of hostilities—on the contractual and proprietary rights and liabilities of enemy subjects, or with the Statute law dealing with the same matter, except in so far as reference to it is necessary for the purpose of

explaining the effect of the Peace Treaty on the proprietary rights and contractual obligations of enemies.

(4)

To start with, an inconsistency between the conception of the war legislation and the Peace Treaty must be pointed out. As regards the application of the rules restraining intercourse with alien enemies, it has always been a well-understood maxim that enemy character does not depend upon nationality, but upon personal or commercial domicil. An enemy subject resident in British territory with the King's license may, during war, be interned or be made subject to conditions as to residence or removal from place to place, but as regards contractual or proprietary rights and to the right to sue in the Courts, he is not treated as an alien enemy, and the fact that such a person is interned does not affect these rights (*Porter* v. *Freudenberg*, 1915, 1 K.B., 857; *Schaffenius* v. *Goldberg*, 1916, 1 K.B., 284). In one respect an exception to this rule was established by an Order made on August 24, 1914, by the then President of the Probate, Divorce and Admiralty Division, under which no Probate of a Will or Letter of Administration of any German or Austro-Hungarian subject were to be granted in respect of any assets in this country, without the express license of the Crown, and in the event of such license being granted a condition was to be attached to it forbidding the distribution or payment of any assets to any beneficiary or creditor being an enemy subject wherever residing. One curious result of this order was that an enemy subject residing in this country was able to recover a debt due to him by a fellow-subject equally residing in this country as long as such enemy subject was living, but the debtor's death put an end to this right.

Another deviation from the recognised rule as to the attribution of enemy character was brought about by the so-called black lists issued by virtue of the Trading with the Enemy (Extension of Powers) Act, 1915, which empowered the Crown by Proclamation to prohibit trade with persons, firms, or Com-

panies residing or carrying on business in neutral countries by reason of the enemy nationality or enemy association of such persons, firms or Companies.

(5)

As regards Trading *Companies* the question as to the determination of enemy character raised some difficulty. Clause 3 of the Proclamation of September 9, 1914, while confirming the general rule under which the expression "enemy" means "any person or body of persons of whatever nationality residing in the enemy country," purports to create an exception from this rule by declaring that "in the case of incorporated Companies *enemy character attaches only to those incorporated in an enemy country.*" The Courts have, however, disregarded this definition (which was clearly *ultra vires* of an Order in Council) and have placed corporate bodies into the same position as private individuals, except that in the case of corporate bodies the commercial domicil takes the place of the residence, and that for this purpose the commercial domicil is to be deemed situate in the place from which the business of a Company is initiated and controlled (*Daimler* v. *Continental Tyre Co.*, 1916, 2 A.C., 307; re *Hilckes* exp. *Muhesa Rubber Plantations*, 1917, 1 K.B., 48).

(6)

The various "Trading with the Enemy Acts" recognise the definition established by the common law rules and confirmed by the Proclamations. The preamble to the Trading with the Enemy (Amendment) Act, 1914, recites that "it is expedient to make further provision for preventing the payment of money to persons and bodies of persons resident or carrying on business in any country with which His Majesty is for the time being at war (which persons and bodies of persons are hereinafter referred to as enemies), in contravention of the law relating to trading with the enemy and for preserving, *with a view to arrangements to be made at the conclusion of peace, such money and certain other property belonging to enemies.*"

By means of the said Statutes the property and rights of persons and corporate bodies, deemed enemies within the above-mentioned definition, were in various ways brought under the control or within the possession of the Public Trustee as Custodian of enemy property, but the first interference with property and rights vested in enemy subjects *residing in this country* was brought about by the Trading with the Enemy (Amendment) Act, 1916. This Statute gave the following powers to the Board of Trade :—

(*a*) to wind up any business carried on in the United Kingdom suspected to be carried on for the benefit or under the control of enemy subjects by reason of the enemy nationality or enemy association of the person, firm or Company carrying it on;

(*b*) to vest in the Custodian of enemy property or rights belonging to an enemy *or enemy subject.*

It also enabled the Custodian of enemy property to require from every enemy subject within the United Kingdom a statement containing particulars as to his property.

(7)

As regards the treatment of private property, the distinction between " enemies " within the definition and enemy subjects residing in the United Kingdom was still maintained by the last-mentioned Statute. When any business was wound up under the power referred to above, the assets remaining after satisfaction of the liabilities were to be distributed among the owners of the business, but so that the share apportionable to owners *deemed enemies under the above-mentioned definition* were to be placed under the control of the Custodian of enemy property; an enemy subject residing in the United Kingdom—being a person not coming within the said definition—was therefore entitled to receive his share of the assets, thus showing that the originators of the provisions as to the winding-up of businesses under enemy influence did not intend to prevent enemy subjects residing in this country to be deprived of property, but only wished them to discontinue commercial activities which might be injurious to British interests.

(8)

The Treaty of Peace has completely altered this position. In one respect this was a matter of necessity. The object of the war law is the prevention of intercourse with the enemy, and for that reason every person residing in enemy territory is deemed an enemy without regard to his nationality. After the conclusion of peace the steps taken against those who were enemies during the war can no longer be under the influence of that motive. British subjects, or the subjects of allied or neutral countries, cannot therefore be treated as enemies by the Peace Treaty, even if they were resident or carried on business in an enemy country during the war. This shows that certain categories of persons who were deemed enemies during the war ought not to be treated as enemies after the conclusion of peace. It does not, however, follow from the necessity of this elimination, that enemy subjects residing outside of Germany—who, unless they were included in one of the lists, were not treated as enemies during the war—should now be dealt with as such. This applies more particularly to enemy subjects resident in the United Kingdom, many of whom have ceased to have any connection with their country of origin except in so far as the tie of formal allegiance (which in normal times was hardly perceptible) is still maintained.

Moreover, the British Courts have in several cases held persons to be German subjects notwithstanding the fact that it was clear that, according to German law, they were not considered as such (exp. *Weber*, 1916, 1 A.C., 481; exp. *Liebmann*, 1916, 1 K.B., 268), the ground being that they had not acquired any other nationality, and that certain rights and liabilities in connection with Germany remained attached to them. I do not think that these cases are binding with reference to the application of the Peace Treaty, inasmuch as the evidence on the German law on which the judgments in question were based was incomplete and partly erroneous. Moreover, the Peace Treaty, being a bilateral transaction, ought to be interpreted in a sense in which it can be understood by both parties, and it is

clear that "German national" from the German point of view can only mean a person who is a citizen or subject of a German State, or of the German Empire, within the meaning of German law.[1] These considerations, convincing as they may be to jurists versed in questions of International Law, will, however, in all probability not be acted on by the administrative authorities before the Courts have made a definite pronouncement of the subject, and in the meantime much hardship will undoubtedly arise.

(9)

The question as to what corporate bodies are to be deemed "German nationals" or "British nationals" will also give rise to difficulties. The Peace Treaty Order, 1919, s. 2, declares that "the expression 'nationals' in relation to any State includes . . . any Company or Corporation incorporated therein according to the law of that State." If this definition were upheld a Company with a capital entirely held by German subjects residing in Germany and controlled and managed in Germany, but incorporated in the United Kingdom under the Companies Consolidation Act, 1908, would not be deemed a German national, while, on the other hand, a Company in the reverse position, incorporated in Germany, would come within that definition. As there are on both sides Companies in whose case the circumstances—though not of quite so extreme a nature—are very similar, this point will no doubt give rise to serious complications.

Art. 296 of the Peace Treaty, which deals with the methods referred to below of settling claims arising out of pre-war transactions, deals on the one side with German nationals *residing within German territory*, and on the other side with British nationals residing in British territory. It will be seen from this that a German subject who resides outside of Germany, but carries on business in Germany and has possibly the whole of his property in Germany, is not affected by the provisions of this article. His British creditors will be able to sue him

[1] The Treaty of Peace Order, 1919, s. 2, declares that the expression "nationals" in relation to any State includes "the subjects or citizens of that State," but this does not carry the matter any further.

in Germany and enforce the judgment against his property, but if his debt is payable in German currency they cannot avail themselves of the benefit (conferred by subs. (*d*)) of receiving payment in £ at the pre-war rate of exchange. Correspondingly a British national not residing in British territory cannot enforce any claims against German nationals in the manner authorised and prescribed by Art. 296.

In connection with this condition as to residence imposed by Art. 296, the much-disputed question as to the place where the residence or domicile of a corporate body is deemed to be will no doubt be brought forward in many cases. In this instance also it ought no doubt to be held that the word "residence," as used in the case of Companies, must be construed in a manner acceptable to the Belligerent Powers on either side, but unfortunately the opinions of international jurists on the subject of the domicil of corporate bodies are of an extremely varied character.[1] In my opinion the place of a Company's domicil is the place where "the brain which controls the operations is situate." From that point of view the position of the official registered office is entirely unimportant.

(10)

The power conferred on the Board of Trade by the "Trading with the Enemy (Amendment) Act, 1916," to make orders vesting property in the Custodian was, as mentioned above, exercisable not merely in respect of the property of persons coming within the definition of "enemies" contained in the "Trading with the Enemy Acts," but extended to the property of all enemy subjects, whilst the corresponding power, which had previously been conferred on the High Court by the Trading with the Enemy (Amendment) Act, 1914, was restricted to "enemies" coming within the definition. The High Court under both statutes had power to authorise the Custodian, out of the

[1] A summary of this variety of opinions is given in my article on "The Nationality and Domicil of Trading Corporations." (Publications of the Grotius Society, Vol. II. pp. 68–71.) In the case of Companies no distinction can, in my opinion, be drawn between domicil and residence.

property vested in him pursuant to either Statute (subject to certain specified restrictions), to pay to any judgment creditor of the original owner of any such property the sum due to him. This right, as far as it was available for the judgment creditors of *enemy subjects*, has come to an end by the coming into force of the Peace Treaty, as debts owing by enemy subjects can only be recovered through the Clearing Offices, to which reference is made below (re *Nierhaus*, W.N., 1920, p. 143). It would, however, appear that in any case in which such a vesting order was made as to the property of a person who was deemed an enemy, *without being an enemy subject*, the judgment creditors are still entitled to the benefit of the Trading with the Enemy (Amendment) Acts.

(11)

The interaction of the war law affecting the private property of alien enemies and enemy subjects and of the stipulations of the Peace Treaty is so important that I may be excused for having devoted so much space to it before coming to grips with the main subjects of this article enumerated above, namely : (*a*) the collection of debts; (*b*) the right to restitution and compensation in respect of German exceptional war measures; (*c*) the effect of the Peace Treaty on pending contracts; (*d*) the effect of the Peace Treaty on Patents, Copyrights, etc., etc.

The mutual rights and liabilities arising under the provisions of Art. 296 of the Peace Treaty, relating to the payment of debts [1] are, as mentioned above, subject to the condition of residence in the country of which the person concerned is a subject. A debt owing to a British subject by a German subject residing in British, allied or neutral territory, does not come under these provisions, nor are they applicable to the claims of a German subject in respect of debts owing by a British subject unless such German subject resides within German territory.

[1] Subsection (*e*) leaves it open to every one of the Allied and Associated Powers to adopt or reject these provisions. They have been adopted for the United Kingdom and certain parts of the British Empire (see Treaty of Peace Order, 1919, s. 3). For the sake of brevity and clearness the rules in the text will be stated as applying between the United Kingdom and Germany.

The corresponding restriction applies to debts owing by British subjects to German subjects and to claims of British subjects against German subjects.

Subject to this restriction as to nationality and residence, the debts to which the provisions of Art. 296 apply belong to the following categories:—

(1) Debts payable before the war.
(2) Debts arising out of pre-war transactions which, but for the rules preventing intercourse with enemies, would have been payable during the war.
(3) Interest on German Government securities which fell due before or during the war.[1]
(4) Capital of German Government securities which became repayable before or during the war.[1]

The expression "debt" implies that there is a claim payable in money, and it therefore follows that property other than money cannot be recovered under the said provisions. Where property other than money belonging to a British subject residing in the United Kingdom is in German custody it may be withdrawn in the ordinary way, and in case of refusal to deliver on the part of the person by whom such property is detained litigation in the German Courts is the only remedy open to the owner of the property.

The debts to which Art. 296 applies can only be collected through the Clearing Offices. A British creditor entitled to the payment of a debt coming within the purview of Art. 296 has to give notice of his claim to the British Clearing Office; the claim is then notified to the German Clearing Office, which in

[1] The proviso by virtue of which in certain specified cases claims for payment of interest on Government securities or for the repayment of such securities are excepted from the general rule does not apply either in the case of the United Kingdom or of the German Empire, or of any German State, and has, therefore, been omitted in the text. Both in the United Kingdom and in Germany the interest and capital on Government securities due to an enemy subject will during the war have been paid to the Custodian of Enemy Property, and can now be claimed through the Clearing Offices. Interest, dividends and capital repayments on the shares and debentures of Companies which became due before or during the war would, of course, come under heads (1) and (2), and can equally be claimed through the Clearing Offices.

its turn informs the debtor of the claim. There is an elaborate machinery for dealing with disputed debts (Annex to Art. 296, s. 16)[1]; debts which are admitted, or which, after having been disputed, are found to be due, have to be paid to the Debtor Clearing Office, and are credited by that Office to the Creditor Clearing Office, but an exception is made in that respect in the case of debtors who have a claim for compensation "for injury from acts of war." The debts due by such persons, though admitted, are not credited to the Creditor Clearing Office before the compensation has been paid (Annex to Art. 296, s. 14).[2]

Where the amount of an admitted or proved debt cannot be recovered from the debtor, the Government of the country in which the debtor resides has to make the required payment, unless the debt prior to the war was barred by prescription, or unless the debtor prior to the war was "in a state of bankruptcy or failure, or had given formal indication of insolvency." Debts payable by any Company wound up under the British or German war legislation are also excepted, but the dividends declared before such winding-up may be recovered through the Clearing Offices (Annex to Art. 296 s. 4).

The debts as between Germany and the United Kingdom are payable in £, even if according to the agreement between the parties they were payable in German currency; in that case the marks have to be converted into £ at the pre-war rate of exchange, unless the contract stipulates for another rate of conversion (Art. 296 (*d*)).[3] Simple interest at the rate of 5 per

[1] Light-hearted claims or light-hearted denials of indebtedness will be prevented by the provision contained in s. 20 of the Annex to Art. 296, which in effect imposes a fine on the unsuccessful party.

[2] The claims of individuals for injury from acts of war arise under the provisions of Arts. 231–244, referred to above, sub. (2). The Peace Treaty does not confer any direct right of compensation to such individuals, but apparently they will not be required to pay any debts owing to German nationals before they have received compensation from their Government.

[3] Thus an Englishman who before the war owed 1000 marks to a German residing in Germany will have to pay £50 to the British Clearing Office, but it appears to be the intention of the German Government only to pay 1000 marks to the German creditor. According to the present writer's view, such a course of action would clearly violate the provisions of Art. 296 of the Peace Treaty.

cent. is allowed in the absence of a contract or legal provision or custom to the contrary [1] (Annex to Art. 296, s. 22).

Where any debt is recoverable through the Clearing Offices, any other mode of payment is strictly forbidden; even the mere correspondence between debtor and creditor on the subject of such a debt involves serious penalties (Annex to Art. 296 (*a*); Treaty of Peace Order, 1919, s. 1 (ii)).

As between the two Clearing Offices monthly balances of debts payable on each side are to be struck; if the balance is in favour of the United Kingdom, Germany has to pay it within a week, but if the balance is in favour of Germany it has to be retained in part satisfaction of the claims of the British Government and British subjects against Germany under the various parts of the Peace Treaty. (This is the clear effect of s. 11 of the Annex to Art. 296.)

By virtue of the right conferred on every Allied or Associated Power by the Peace Treaty (Annex to Art. 298, s. 4), the Peace Treaty Order, 1919, by s. 1 (xvi) has charged "all property, rights and interests within His Majesty's Dominions or Protectorates belonging to German nationals at the date when the Peace Treaty came into force" (not being property, etc., acquired under license) with the payment of various claims, including claims for the payment of debts owing to British subjects by German subjects. The debts recoverable through the Clearing Offices may therefore be paid out of the fund formed by the realisation of such "property, rights or interests." [2] The British claimants are therefore amply secured, whereas the German claimants have only an unsecured claim against their Government.

[1] This clause may give rise to considerable difficulty; the question whether such a legal provision or custom exists would depend on the law which governs the contract, but this point frequently gives rise to disputes.

[2] Debts owing to British subjects not residing in British territory, or by German subjects not residing in German territory, cannot be recovered through the Clearing Offices, but they appear to be entitled to the benefit of the charge.

(12)

Whilst as regards the provisions in respect of the payment of debts there is a theoretical mutuality between any part of the British Dominions and Germany, tempered, it is true, by the special conditions which, in effect, prevent all payments or transfers to Germany, the provisions in respect of reparation or compensation in respect of exceptional war measures do not confer any rights on German subjects except in so far as they are entitled to compensation from their own Government in respect of the sale or retention of any of their property rights or interests within British territory (Art. 297 (i)).

The exceptional war measures here referred to as regards the United Kingdom and Germany were of a similar character; they included : (*a*) the vesting of enemy property in a Custodian appointed for that purpose; (*b*) the winding-up of businesses or Companies in which enemies were interested; (*c*) the sale of enemy property for the benefit of creditors; (*d*) in Germany the sale of property belonging to enemy individuals was also permitted and practised, even where no creditors were concerned.

The validity of all such measures taken in either country is expressly recognised by the Treaty of Peace, but as regards measures taken in Germany only in so far as they were taken before the date of the armistice (Art. 297 (*d*); Annex to Arts. 297 and 298 s. 1). Whilst, however, the British Government retains the right to proceed with such measures as regards German property, rights or interests (Art. 297 (*b*); Annex s. 9), Germany, on the other hand, was bound, immediately on the coming into force of the Peace Treaty, to discontinue them in every case where they had not been completed, and on such discontinuance the persons interested became entitled to be restored to their full rights (Art. 297 (*a*); Art. 298).[1]

Where property belonging to a British subject is not restored owing to the fact that the war measures concerning it had already been completed, or where any such property by reason

[1] Accounts and records as to the measures taken in respect of British property have to be furnished on demand (Annex, s. 13).

of a war measure is damaged, the owner of the property has the option of claiming restitution [1] or compensation.[2] The right to restitution would have to be enforced through the ordinary channels; the right to compensation has to be asserted through the Mixed Arbitral Tribunal, which also deals with disputed claims as to debts.[3]

The benefit of the clauses intended for the indemnification of British parties injured by German exceptional war measures, as a general rule, does not merely accrue to the direct owners of the property affected by such measures but also to the shareholders or partners in Companies or Associations (wherever incorporated) whose property has been affected thereby (see, for instance, Art. 297 (*a*), (*e*)), but the claim for restitution is in each case confined to the individual owner of the property.

(13)

The proceeds of German property [4] held in the United Kingdom are charged with the following payments: (*a*) with the payment of the claims of parties damaged by German war measures; (*b*) with the payment of debts recoverable under the above-mentioned rules; (*c*) with the payment of claims of British subjects in respect of rights, property and interests situate in Austria Hungary, Bulgaria and Turkey; (*d*) with the claims of the British Government under the Reparation Clauses (Peace Treaty Order, 1919, s. 1 (xvi); Peace Treaty, Art. 243, Art. 297 (*h*); Annex to Arts. 297, 298, s. 4). It is clear from these provisions that the whole of the private property of German subjects (not released from this charge under the power in that behalf contained in the Peace Treaty Order) will be absorbed by these

[1] This option does not exist in the case of the subjects of a State in which any legislative measure ordering a *general* liquidation of enemy property was passed during the war (Art. 297 (*g*)).

[2] Where property has been sold and the proceeds have been invested the cash has to be accounted for; the investments are to be disregarded (Annex to Arts. 297 and 298, s. 12).

[3] As to the constitution of this Tribunal, see Art. 304 of the Peace Treaty.

[4] Documents of Title relating to such property being still in Germany have to be surrendered before the 10th July, 1920 (Annex to s. 297, s. 10).

claims, but the German owners of the confiscated property have a right to compensation from their Government (Art. 297 (i)).

(14)

As regards contractual rights, the effect of the outbreak of war on mutually executory pending contracts between British subjects and alien enemies must, in the first instance, be considered. The law on this subject is still uncertain in some respects as in the leading cases (*e. g.* the case of *Ertel Bieber & Co.* v. *Rio Tinto Co., Limited*, 1918, A.C., 260) the judgments, though unanimous as to the result, are based on slightly divergent grounds, but there is an entire consensus on all sides on two propositions, namely : (*a*) that all contracts involving intercourse with the enemy during the continuance of the war are dissolved by the outbreak of war; (*b*) that a contract involving such intercourse but containing a clause suspending its operation during war, is equally dissolved by the outbreak of war on grounds of public policy.

Among recent continental lawyers these rules have not been recognised as sanctioned by International Law (for references see Hall, *loc. cit.*, p. 384, *note* 3), and during the present war the well-known jurist, Mendelsohn-Bartholdy, has maintained that their acceptance by English authorities as rules of International Law was due to a falsified quotation from Bynkershoek in the course of Lord Stowell's well-known judgment in *The Hoop* (see *Deutsche Juristenzeitung*, Vol. XX., pp. 662–667).

If the Peace Treaty had not laid down definite rules on this subject, being in harmony with the principles established by the British Courts, considerable difficulties would have arisen between British and German parties to contracts treated as dissolved by the British parties, but relied on as subsisting by the German parties, and Arts. 299–303 and the Annex thereto of the Peace Treaty will accordingly save a considerable amount of undesirable litigation. The rules established by this section of the Peace Treaty cannot, however, claim to be precedents to be accepted for the future as rules of International Law, inasmuch as they

are not binding on the United States of America, nor on Brazil and Japan (Art. 299 (*c*)).

The general rule established by the Peace Treaty as between Great Britain and Germany is that contracts, with the exception of certain special classes of contracts which were in force at the outbreak of war, are to be treated as dissolved by the outbreak of war, but so that any pecuniary obligation arising out of any act done or money paid under any contract so dissolved is to remain binding on the party having incurred such obligation; Art. 299 (*a*). If, for instance, a German merchant has before the war agreed with an English merchant to deliver a certain quantity of specified goods at a specified price in every year for a period of ten years, the obligation to deliver the yearly quantities did not revive on the termination of the war, but the obligation to pay for the goods delivered before the outbreak of war remained in force.

The class of contracts excepted from this rule, as between Great Britain and Germany, are: (1) contracts relating to the sale, letting, or mortgaging of land or houses, or the exploitation of mines; (2) contracts between individuals and Government authorities, or municipal authorities; (3) insurance contracts, with the exception of contracts of marine insurance, not being included in the class of contracts mentioned, sub. (4); (4) contracts of marine insurance in cases where the risk attached before the outbreak of war, but so that no loss due to the belligerent action of Great Britain or any of the Allied or Associated Powers shall be deemed covered by any such insurance,[1] and subject also to the provision that where after the outbreak of war a risk previously covered by an enemy was covered by a fresh contract with an insurer who was not an enemy, the last-mentioned contract is to take the place of the one first mentioned. Contracts of re-insurance, with the exception of re-insurances of life risks effected by particular contracts, are deemed to have been cancelled by the outbreak of war, subject to specified mitigations in specified cases of hardship. (Annex to Art. 299).[2]

[1] This carries out the well-known rule referred to in the case of *Jansen* v. *Driefontien Mines*, 1902, A. C. 484, 499.

[2] The Annex contains a number of provisions as to the adjustment of

While in this manner special classes of contracts between British and German parties are preserved by the rules stated above, there is a general rule under which " any contract of which the execution shall be required in the general interest " by the British Government is to be excepted from the general rule as to dissolution of contracts; a party to any contract thus revived is entitled to obtain equitable compensation in the event of the performance of the contract causing him " substantial prejudice," owing to the alteration of trade conditions. The amount of the compensation in such a case is to be assessed by the Mixed Arbitral Tribunal referred to above (see p. 182). The revival of contracts otherwise deemed to be cancelled by the outbreak of war can only take place within six months after the coming into force of the Peace Treaty, and the possibility of any such revival as between this country and Germany will therefore expire on July 10, 1920 (Art. 299 (*b*)).

(15)

Rights arising under contracts or by virtue of negotiable instruments, and recognised as subsisting by the rules referred to above, but which would have become extinguished by the effect of prescription, or by reason of the failure of any party to carry out his obligations within the time originally stipulated for, are preserved by the Peace Treaty in the manner shown in Arts. 300 (*a*), (*d*), (*g*), 301.[1]

In the last-mentioned respect there is complete mutuality between Great Britain and Germany, but as regards measures of execution brought about by the failure of the performance of any obligation, or the non-compliance with any formality during the war, only British parties have a right to restitution or compensation (Art. 300 (*b*), (*c*)).

A similar want of mutuality exists with reference to the

matters between the parties to cancelled or revived contracts, to the treatment of negotiable instruments, security for debts, etc., which cannot be summarised in a compendious manner.

[1] As regards insurance contracts there are special rules defining the consequences of the failure to pay the premiums at their due dates (Annex to Arts. 299–303, ss. 9, 11).

enforcement of judgments. On the one hand, Art. 302 (first para.) declares that judgments given by the Courts of an Allied or Associated Power in all cases in which under the Peace Treaty they are competent to decide,[1] have to be recognised as final and to be enforced in Germany without reference to the question whether the party against whom judgment was given was able to appear in the action. On the other hand, Art. 302 (second and third paras.) entitles any national of an Allied or Associated Power against whom judgment was given by a German Court, in an action in which he was unable to make his defence, either to compensation or to *restitutio in integrum*.

(16)

The provisions as to the treatment of questions relating to industrial, literary and artistic property are of a necessarily involved nature, owing to the complications created by the encroachments which were a necessary consequence of the war. The Berne Copyright Convention and the Paris Convention for the protection of industrial property were, of course, while the war lasted, treated as non-existent as between the belligerent Powers. Therefore British Copyrights, British Patents, Trade Marks or Designs had no protection within Germany, and *vice-versa*.[2]

As regards British Patents, Trade Marks or Designs owned by German subjects or by persons or Companies resident or carrying on business in German territory, the Patents, Designs and Trade Marks (Temporary Rules) Acts, 1914, and the Rules made thereunder enabled the Board of Trade during the war, and for six months after the war, to do certain specified acts interfering

[1] I have been unable to find any express provisions as to the competence of the Courts of Allied and Associated Powers in the case of proceedings by or against German nationals. The provisions as to the competence of the Courts in the case of any conflict between Clearing Offices (see Annex to s. 296, ss. 16, 25) are clearly not referred to, as they also give competence to German Courts. The question whether a Court was or was not competent under the Peace Treaty may therefore create considerable difficulty.

[2] As in the other parts of this article, the illustrations in the text are confined to the effect of the Treaty as between the United Kingdom and Germany.

with the owners' rights (*e. g.* to grant a license to work the patented invention, or to use the registered design). Similarly a German Ordinance dated July 1, 1915, and the Rules made thereunder on July 2, 1915, enabled an official appointed for the purpose to suspend or restrict or confer on others all rights of industrial property owned by British subjects.

Under the conditions thus created—(*a*) by the suspension of the said International Conventions; (*b*) by the exercise of the powers conferred in both countries on administrative authorities by the above-mentioned war legislation, previously existing rights were, of course, disturbed and new rights were created. It was therefore obviously necessary on the re-establishment of peace to restore as far as possible the state of things as it existed before the war, but on the other hand to grant indemnity in respect of all infringements rendered possible by the war conditions, and to protect rights created under these conditions. These objects are intended to be attained in the following manner:—

The protection of British industrial rights and of British copyright in Germany, and of the corresponding German rights in the British Dominions was, as mentioned above, reinstated by the revival of the Paris and Berne Conventions as from January 10, 1920 (Art. 286, Art. 306 (first para.)). The protection of British rights owned by German subjects and of German rights owned by British subjects was similarly re-established by the mere fact of the termination of the war (subject, however, as to rights owned by German subjects to the charge imposed by the Peace Treaty Order, 1919, and by Art. 297, Annex s. 4).

As regards acts done and rights created during the war, it is provided that no action is to be brought and no claim made in either country: (*a*) in respect of any act done during the war in the enemy country, which, but for the existence of war, would have constituted an infringement of an industrial right, or of a copyright; (*b*) in respect of the sale, or offering for sale in the enemy country, prior to June 28, 1920, of any article, or work, manufactured or published during the war or prior to that date, the sale or offering for sale of which work would under normal conditions have constituted an infringement (Art. 309).

While these provisions apply to both sides equally, the following provisions operate exclusively in favour of the British Dominions and against Germany :—

(1) All rights granted by virtue of any British war legislation in respect of industrial property or copyright originally belonging to any German national remain in force, whereas the rights similarly granted under the German war legislation become extinguished, except in so far as the exercise of these rights within a limited period is rendered immune by the above-mentioned stipulations (Art. 306, second para.).

(2) No action is to be brought and no claim made in respect of the use on the part of or on behalf of the British Government of any industrial right or copyright belonging to any German national, or of the sale or offering for sale of any article or work to which any such right applies (Art. 306, third para.).

(3) As regards any British industrial right or copyright which under the ordinary law could, under the existing peace conditions, be acquired by any German national after the coming into force of the Peace Treaty, the British Government is entitled to impose such limitations, conditions or restrictions " as may be considered necessary for national defence, or in the public interest, or for assuring the fair treatment by Germany of the rights of industrial, literary and artistic property held in Germany by (British) nationals " [1] (Art. 306, fifth and sixth paras.).

The Peace Treaty also contains a number of provisions for preventing the lapse of rights by reason of the non-payment of fees or the non-performance of formalities or by reason of the omission to work a patent or to use a trade mark or design during the continuance of the war (Art. 307).

(17)

A criticism of the manner in which private property has been affected by the stipulations of the Peace Treaty is hardly possible at the present moment, as some time may elapse before the

[1] As regards rights acquired at an earlier date, such limitations, conditions or restrictions may also be imposed " for securing the due fulfilment of all the obligations undertaken by Germany " in the Peace Treaty.

practical result of the stipulations summarised above will be shown. It is clear that many of the provisions affecting enemy property will cause much undeserved hardship to some persons, and that, on the other hand, they will confer undeserved advantages on others. Many other incidents of war have the same results, and, while the reaping of advantages by individuals as the result of war is deplorable in every respect, the infliction of pecuniary loss on persons who have remained immune from the dangers of the battle-line and of the trenches cannot be considered an evil from the public point of view.

The main question which calls for an answer is whether the treatment of private property of individuals after the conclusion of peace in the manner exemplified by the Treaty of Peace with Germany has set a precedent which ought to be adhered to in the future. To those who are of opinion that freedom of commercial intercourse between nations is to the common advantage of all nations, it would appear that the risk of the confiscation of property on the part of any foreign country in which such property may, for the time being, be situate, constitutes a factor which must materially impede such freedom of intercourse, and from this point of view the stipulations in question will probably have an undesirable effect.

On the other hand, the knowledge that the commercial classes of a country engaged in a war will, in case of defeat, suffer heavy pecuniary loss must have a healthy deterrent effect on a number of powerful and influential persons who might otherwise be favourable to ambitious military projects.

It may be said that the number and importance of the Allied and Associated Powers, who jointly with this country agreed to the terms in question, will in itself be an element apt to set up the principle embodied in this term, as a principle fit to be adopted by International Law, but it has to be remembered that some of the Powers have in several instances qualified or refused their assent, and the fact that the adherence of the United States remains in doubt is another circumstance impairing the force of this agreement.

INTERNATIONAL LABOUR CONVENTIONS

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THE nineteenth century was the age of Commercial Treaties; the twentieth may be that of Labour Conventions. Certainly until recently the latter were almost unknown; special articles in Commercial Treaties might deal with the treatment of workmen,[1] but none exclusively related to them. It is found, on comparing the modern statutes of most countries with their treaties, that both proceed in the main on parallel lines; subjects with which Parliaments are much concerned, diplomacy deals with in treaties; and the general legislative activity as to labour foreshadows an increase of Labour Conventions.

Those which exist may be divided into four classes or groups :—

(*a*) Those dealing with the emigration and immigration of certain kinds of unskilled labourers, often described as "indentured," "contract" or "recruited" labour; measures intended to protect workers, likely from their ignorance, inexperience and helplessness to be imposed upon by those who engaged them, and to prevent the reinstatement, under the guise of contracts, of certain forms of the slave trade.

(*b*) Secondly, Conventions intended to protect home workers against evils believed to be incident to the influx of low grades of foreign labour or workers with a standard of life different from that of the native population; in particular, to protect white workers against the competition of Asiatic labourers.

[1] *E. g.* In the Convention between Portugal and Hawaii, May 5, 1882 (Art. 3), Martens, *Recueil*, 2me Ser., XIV. 33; Treaty of Commerce, April 3, 1911, between Great Britain and Japan; Hertslet's *Commercial Treaties*, XXVI. 734.

(*c*) Thirdly, Conventions designed to equalise the conditions of native and foreign labour; to benefit both simultaneously and reciprocally.

(*d*) Fourthly, Conventions intended both to unify labour laws and to raise the conditions of workers generally.

The third and fourth divisions are not sharply separated; they overlap. But, on the whole, they are distinct. The first group dates from about 1860. There are few examples of the second before 1880. In point of form, the first three groups consist of bipartite treaties; a peculiarity of the fourth group is that they are multipartite treaties. In point of substance, diverse though the subject-matter of the first two groups appears to be, there is a certain unity in them; they originate in the competition of high-priced with low-priced labour; they are episodes in labour difficulties, not yet ended, perhaps only begun, occasioned by the contact of the West with the East. All of these divisions correspond to well-marked stages in the history of labour. There is the prospect, it will be seen, of a fifth class of treaties more numerous and important than any of the above.

First Group

When slavery and the slave trade were abolished, several Governments found themselves face to face with perplexing problems. Where was cheap labour to be obtained? How was cotton to be raised? How was sugar cane to be grown? Where white workers could not live and thrive, who was to replace the negro? The abolition of slavery in British Colonies in 1834 and in the French Colonies in 1848 raised these questions, and gave a great impulse to immigration. At once arose a widespread demand for cheap labour. An abundant supply seemed to be at hand in populations with a low standard of life. Coolies from India, Kanakas, other inhabitants of Polynesia, Chinese and Japanese, were from their habits and physique the workers who were needed. Attracted by the wages offered them, they entered into contracts which often appeared bene-

ficial but which quickly brought about the reality of slavery. Where slavery had not existed, but where rough pioneer work had to be carried out—swamps to be drained, railways to be built, land to be reclaimed—there was the same demand for cheap labour, and for a time the same indifference as to the means of procuring it. The importation of this class of workers into some of our colonies, *e. g.* into Australia, from New Guinea, the New Hebrides and the Solomon Islands, had begun as far back as 1847. By 1860–67 the trade in "contract labour" had increased and had degenerated into slave-hunting, almost undisguised. So manifest and flagrant had become these evils that a traffic which had at first been left to private persons to conduct in their own way was brought under the control of Governments. There was legislation in regard to the importation into Queensland and other British Colonies of Polynesian labourers; there were Conventions between the Governments chiefly concerned with a view to prevent gross abuses.

Of the Conventions designed to regulate some of the various forms of importation of labour I mention only a few :—

(*a*) *Emigration of Coolies from India.*—In the early part of the nineteenth century attempts were made to engage labourers in Bengal to serve for a term of years in Mauritius and the French Colony of Réunion. At first employers and workers were left free to make what contracts they deemed right. The only measure of control which the Government of India attempted to exercise was to require employees to appear before a magistrate and to satisfy him as to their freedom of choice and knowledge of the conditions which they accepted. But the growth of abuses,[1] slavery reappearing under new names, necessitated legislation. Even before the Mauritius demand began, the French Colony of Réunion had drawn upon the labour supply of India. The abolition of slavery in 1848 in the former brought matters to a crisis. "The result was the establishment of emigration from the French settlements on the Coromandel Coast which gave rise to the practice of kidnapping and decoying

[1] *Report of Lord Sanderson's Committee on Emigration from India*, Cd., 5198, Part I. pp. 2, 8.

British subjects and led to preventive legislation in India" (Act 24 of 1852). Negotiations were entered into with the French Government resulting in two Conventions. I quote freely from their text, because they are typical of a class of Conventions which became common. By the first of these Conventions (dated July 1860) between Great Britain and France, it was agreed that the French Government shall be at liberty to recruit and engage in the Indian territories belonging to Great Britain labourers or emigrants not exceeding 6000 for the Colony of Réunion (Art. 1). In the British ports where emigrants embark an agent specially charged with the care of their interests was to be appointed (Art. 5).

Art. 6: "No emigrant shall be embarked unless the agent described in the preceding Article shall have been enabled to satisfy himself, either that the emigrant is not a British subject, or, if a British subject, that his engagement is voluntary, that he has a perfect knowledge of the nature of his contract, of the place of his destination, of the probable length of his voyage, and of the different advantages connected with his engagement."

Art. 8: "The contracts shall, moreover, make stipulation for: (1) The duration of the engagement, at the expiration of which the emigrant shall receive a return passage to India, at the expense of the French Government, and the terms on which it will be competent to him to renounce his right to a free return passage; (2) The number of days and hours of work; (3) The wages and rations, as well as the rate of payment for extra work, and all the advantages promised to the emigrant; (4) Gratuitous medical treatment for the emigrant, except in cases where, in the opinion of the proper general officer, his illness shall have arisen from his own misconduct.

Art. 9: The duration of the immigrant's engagement shall not be more than five years.

Art. 10: The immigrant shall not be bound to work more than six days in seven, nor more than nine and a half hours a day.

Art. 14: Every emigrant vessel must carry a European surgeon and an interpreter.

Provisions were inserted to prevent over-crowding and the renewal of the horrors of the middle passage (Art. 15).

Art. 16: Each shipment of emigrants shall include a proportion of women, equal to at least one-fourth of the number of men.

Art. 21: In the distribution of labourers no husband shall be separated from his wife, nor any father or mother from their children under fifteen years of age. No labourer shall be required to change his employer without his own consent, unless he be transferred to the Government, or to the person who has acquired the property on which he is employed. Immigrants who may become permanently incapable of work, either by slackness or by any other cause beyond their own control, shall be sent back at the expense of the French Government, whatever time may still be wanting to entitle them to a free return passage." [1]

These Conventions have become obsolete. So far as India is concerned, the day of the "indentured labourer" is over.

The latest Convention between Great Britain and France on this subject concerning the New Hebrides is the General Convention of October 20, 1906: No vessel is to recruit labourers in the New Hebrides unless she sails under the flag of one of the two signatory Powers and has a recruiting license (Art. 31). The masters of the vessels are required to keep a careful account of places visited, natives recruited, the terms of service, etc. (Art. 32). No engagement is to be for more than three years (Art. 34), and married women may be taken only with the consent of their husbands, unmarried women only by the consent of the Head of the Tribe (Art. 33). The labourers recruited are not to be obliged to work except between sunset and sunrise (Art. 45), and their wages shall be paid exclusively in cash; a part of the wages may be deposited with the Resident Commissioner to be paid to the native as he desires (Arts. 46, 47).[2] Every labourer who has

[1] Hertslet's *Commercial Treaties*, XI. 178. There was a similar Convention of July 1, 1861, as to emigration from India to French Colonies (Hertslet, XI. 203). See also Declaration of November 5, 1872 (Hertslet, XIII. 477).

[2] But these precautions and this machinery notwithstanding, there was often no true freedom. There is a letter by Bishop Patteson to Lord Normanby, dated 1872, which throws a flood of light on the subject. "The simple fact is that among the natives of all the islands north of the lower New Hebrides,

completed his term shall be returned to his home at the first convenient opportunity and at the expense of his employer (Art. 51).[1] These articles were the subject of an inquiry, just before the War, by a committee presided over by Lord Emmott. So far there has been no amending or supplementary Convention.

(*b*) *Emigration from China.*—I select next the group of Conventions with China. Though that country is, and long has been, thickly peopled, and though it has often suffered much from famine and civil disturbances, the migration from it was, until lately, small. Even now, considering the vastness of its population, the outflow, as compared with that from some European countries, is not excessive. For a long time emigration was discouraged—nay, in 1718 forbidden—by the Chinese Government. Those who had left the country were recalled. In 1728 all Chinese abroad without license or not returning were banished; such as returned were liable to the punishment of death. Chinese subjects were prohibited from proceeding clandestinely to sea to trade, or to remove to foreign islands for the purpose of inhabiting and cultivating the same, on the pain of being dealt with "according to the law against communicating with rebels and enemies." Practically these prohibitions, often not operative with a weak or corrupt Government, were by implication repealed by the treaty of October 25, 1860, concluded between Great Britain

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an agreement such as that upon which the legal status in the Colony (Queensland) of those people rests, is generally impossible for want of interpretation; and, if they are not taken from their homes under an agreement to which they give an intelligent assent, I would ask your Excellency what their status in Queensland is? They are certainly not voluntary emigrants; they are certainly not free labourers" (II. 599). See also Jacomb on *The Future of the Kanakas;* Keith, *Responsible Government in the Dominions*, II. 1098.

There may have been a good side to this trade. While admitting grievous hardships occasionally inflicted by masters and crews of ships engaged in labour recruiting, Sir Everard im Thurn says: "I also know and have assured myself that a very large proportion of the natives transferred even in those early days from their original savage homes to new and at least more civilised places, settled down comfortably to themselves, and became excellent workers, and, in their way, good citizens."—*King's College Lectures on Colonial Subjects*, p. 69.

[1] Protocol of February 27, 1906, confirmed by Convention of October 20, 1906, Hertslet, XXIV. pp. 424, 472.

and China. But not until 1893 was the edict formally repealed.[1]

The tide of emigration at first set from the provinces of Fokien and Kwantung, to Formosa and California, later to the Dutch Indies, Malaysia, Indo-China, Singapore, the Philippines, Burmah, Siam, Borneo and Australia.

By the Convention of October 24, 1860,[2] between Great Britain and China, the Emperor of China consented to allow Chinese subjects, wishing to take service in British Colonies or other parts beyond the sea, to enter into engagements with British subjects, and to ship themselves and their families on board of British vessels in conformity with regulations to be drawn up by the two Governments (Art. 5). No regulations having been drawn up, a further Convention of May 13, 1904, was entered into.

On each occasion when indentured emigrants are required for a particular British Colony or Protectorate the British Minister at Peking shall notify the Chinese Government, stating the name of the particular Colony or Protectorate for which the emigrants are required, the name of the treaty Port at which they are to embark, and the terms and conditions upon which they are engaged. The Chinese Government shall thereupon immediately instruct the local authorities to take all the steps necessary to facilitate emigration. The Chinese Inspector and the British Consular officer at the port of embarkation shall give information to the emigrant respecting the country and its laws.[3]

Art. 7 states that the indenture shall clearly specify the name of the country for which the labourer is required, the duration of the engagement and, if renewable, on what terms,

[1] "The Imperial Government of China has always consistently refused to sanction the emigration and expatriation of its subjects. Emigration might be tolerated if application were made for a permit, to be granted for special reasons, but without a permit the unlicensed emigrant was liable to severe punishment." Morse, *International Relations of the Chinese Government*, II. 163. See also Loening in Conrad's *Handwörterbuch*, II. 271.

[2] Hertslet, XI. 221.

[3] *Ibid.*, XXIV. 221; Martens, 2me Ser., XXXII. (1905), p. 325.

the number of hours of labour per working day, the nature of the work, the rate of wage and mode of payment, the rations, clothing, the grant of a free passage out, and, where such is provided for therein, a free passage back to the port of embarkation for himself and family, right to free medical attendance and medicine whether in the Colony or Protectorate or on the voyage from and to the port of embarkation in China, and any other advantages to which the emigrant may be entitled.

Art. 9: In every British Colony or Protectorate to which indentured Chinese emigrants shall proceed, an officer or officers shall be appointed whose duty it shall be to insure that the emigrant shall have free access to the Courts of Justice to obtain the redress for injuries to his person and property which is secured to all persons, irrespective of race, by the local law.[1]

All these Conventions belong to a post-slavery policy of solicitude for the welfare of labourers employed to replace slaves, or to perform work in circumstances in which the abuses connected with slavery were probable.

Second Group

I come to the second class of Conventions relative to labour. In the United States and in most of our Colonies there was a time when increase of population was regarded as a benefit irrespective of its quality. Gradually, however, the danger of free introduction of foreign elements, regardless of their quality, of the entrance not merely of illiterates, paupers and criminals, but also of persons accustomed to a low standard of life, was recognised; and in the United States and our Colonies were passed a long series of statutes intended to restrict or supervise alien immigration. These were supplemented or accompanied by various Conventions which fall into three or four groups. I cannot give a complete enumeration of them. I merely select some typical examples.[2]

[1] Hertslet, XXIV. 221.

[2] See as to the history of treaties between China and the United States relating to labour, *The Chinese Exclusion Case*, 130, U.S., p. 589; also *Les États fermés aux Chinois*, Clunet, 1892, p. 388.

The outflow to the United States had begun about 1834 to 1854. Some 13,000 are stated to have arrived in the former year. They were for a time freely admitted. The first treaty between the United States and China in 1844 recognised the right of the subjects of the latter to emigrate (*Hall on Immigration*, p. 327).[1] The policy of the open door was embodied in the Burlinghame treaty of June 18, 1858. It recognised "the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free immigration and emigration of their citizens and subjects respectively from one country to another for purposes of curiosity, of trade, or as permanent residents." Both Governments agreed to "pass laws making it a penal offence for a citizen of the United States or China to take Chinese subjects either to the United States or to any other foreign country (or *vice versa*) without their free and voluntary consent respectively" (Art. 5).[2]

A new policy was initiated in the United States between 1860–66. The advent of the Chinese, previously encouraged, began to be regarded with jealousy, suspicion and antipathy; the policy of the open door was reversed; and from that time there was a series of statutes and conventions intended to exclude Chinese. They had been valuable pioneers. In early days they had been most helpful in the development of California, in the reclamation of swamp lands, in railway making, in mining, in agriculture, in fruit-farming, in manufactures and as domestic servants. The Pacific Coast States, particularly California, pressed Congress in 1878 and subsequently to prevent or restrict immigration. The new policy of exclusion culminated in the Convention of November 17, 1880. Whether or not from dread of their efficiency, antipathy to some of their alleged habits, or their readiness to accept lower wages than the native American workman, the Chinese became the subjects of hostile legislation, and their Government was forced to assent to unequal treaties. The earliest trace of a change in America dates from about 1862.

[1] The Article is embodied in the Convention with Peru of 1877 (Art. 6), Hertslet, *China Treaties*, I. 416.

[2] Martens, 2me Ser., XX. 100.

In that year the United States, influenced by reports as to the trade in Coolies to Cuba and Peru, passed an Act (2158 and 2162 of Revised Statutes) against the importation of Coolies. The new policy was expressed in the Convention of November 17, 1880, which stated that "Whenever, in the opinion of the Government of the United States, the coming of Chinese labourers into the United States, or their residence there, affects or threatens to affect the interests of that country, or to endanger the good order of the said country, or of any locality within the territory thereof, the Government of China agrees that the Government of the United States may regulate, limit or suspend such coming or residence, but may not absolutely prohibit it. The limitation or suspension shall be reasonable, and shall apply only to Chinese who may go to the United States as labourers, other classes not being included in the limitations. Legislation taken in regard to Chinese labourers will be of such a character only as is necessary to enforce the regulation, limitation, or suspension of immigration, and immigrants shall not be subject to personal maltreatment or abuse (Art. 1).[1]

Art. 2 states that "Chinese subjects, whether proceeding to the United States as teachers, students, mercenaries, or from curiosity, and Chinese labourers who are now in the United States shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities and exemptions which are accorded to citizens of the most favoured nation."[2]

In 1894 (March 17) was signed a further Convention between China and the United States, still more drastic than that of

[1] "It is significant that the bulk of emigration has been recruited from more and more backward races of Europe as the decades have succeeded each other. . . . This wage for which they are willing to sell their labour is in general appreciably below that which the native American workman requires to support his standard. What does this mean? It means, in the first place, that the American workman is continually underbid in the labour market by vast numbers of alien labourers who can do his work approximately as well as he. But it means more than this. It means that he is denied the opportunity of profiting by those exceptionally advantageous periods, which as we have seen recur from time to time, and provide the possibility of an improved standard."—Fairchild on *Immigration*, p. 306.

[2] Martens, 2me Ser., XI. (1887), p. 730; also 2me Ser., XX. p. 103.

1880. In consequence of "the antagonism and much deprecated and serious dangers to which the presence of Chinese labourers has given rise in certain parts of the United States," the importation of Chinese labourers into the United States was absolutely prohibited for ten years (Art. 1). This was without prejudice to any registered Chinese labourer, who had a lawful wife, child or parent in the United States, or property therein of the value of 1000 dollars, or debts of a like amount due to him for early settlement.[1] A similar policy was pursued in some British Colonies, where Chinese labour, for a time gladly received, had become the subject of antagonism or apprehension. "The Chinese first came to Australia in 1848, where they were employed as shepherds by Queensland squatters."[2] They arrived in thousands when the gold discoveries were made. Welcome at first, they became the subjects of hostile legislation, to describe which would be outside the object of this paper. Victoria in 1855 and New South Wales in 1861 took the initiative in measures excluding them. In 1885 the Canadian Dominion Parliament passed a law (48 and 49 Vict., c. 67) restricting and regulating the immigration of Chinese into Canada, imposing a tax and prohibiting the organisation of private tribunals by the Chinese.[3]

Whether this class of treaty will continue is uncertain. But

[1] Martens, 2me Ser., 640; Morse's *Digest*, V. 441. See Tyau on *Treaty Obligations between China and other States*, p. 10 *n.*, p. 3; Keith, *Responsible Government in the Dominions*, II. 1075.

There was a series of statutes passed by Congress to restrict Chinese immigrants; *e. g.* 1880 (March 12), Martens, 2me Ser., XX. 110; 1881 (February 26), 2me Ser., 95, amended by Act of 1898 (March 3), Act of 1881 (October 1). The supreme Court held in *Cha Chan Ping* v. *United States* (1889, 130 U.S. 581), that the Act of October 1, 1888, excluding Chinese labourers from the United States was constitutional and abrogated existing treaties so far as it conflicted with them.

[2] Reeves, *State Experiments in Australia and New Zealand*, II. 328.

[3] The revised statute (Chinese Immigration Act, 3 Ed. VII., c. 8) imposes on every person of Chinese origin on entering Canada a tax, payable at the port or place of entry, of five hundred dollars. No Chinese are to be landed until a permit is obtained. Every master of a ship bringing Chinese immigrants is personally liable for the payment of the tax.

As to other Conventions relative to Chinese emigration, see Convention between *China and the Netherlands*. Hertslet's *China Treaties* (1863), I. 407; *China and Peru* (1874), I. 415 (Art. 6); *China and Spain as to Emigration to Cuba* (1877), I. 522; *China and Mexico* (1899), I. 404.

at present there is no sign of abatement of the antagonism to the introduction into the United States or the Dominions of a large Eastern element.

Third Group

The third group of Labour Conventions consists of those designed to equalise, on a footing of reciprocity, the rights of native and foreign workmen. They first appear in 1904. They are bipartite Conventions, and their main object is to give foreign workmen the benefit of municipal legislation. As a rule they do not alter the native law; they merely extend its operation. Of these the first was the Luzzatti-Fontaine Convention (April 15, 1904) between France and Italy, to assure to the subjects of the two countries the benefit of "assurances sociales et les progrès de la législation ouvrière." The preamble states that the Governments desire "assurer à la personne du travailleur des garanties de réciprocité analogues à celles que les Traités de Commerce out prévues pour les produits du travail, et particulièrement: 1° Faciliter à leurs nationaux travaillant a l'étranger la jouissance de leur épargnes et leur ménager le bénéfice des assurances sociales; 2° Garantir aux travailleurs le maintien des mesures de protection déjà édictées en leur faveur et concourir au progrès de la législation ouvrière."

As to "la jouissance de leur épargnes," Art. 1 (*a*) provides that money lodged as savings either in the National Savings Bank of France or in the Post Office Savings Bank of Italy may be transferred without costs from one Bank to the other on the application of the interested party. A like system of transfer is to be instituted between various private savings banks of France and Italy. Art. 1 (*b*)—

(*b*) "Les deux Gouvernements faciliteront, par l'entremise tant des Administrations postales que des caisses nationales, le versement des Catisations des italiens résidant en France à la caisse nationale de prévoyance d'Italie et des français résidant en Italie à la caisse nationale des rétraites de France. Ils faciliteront, de même, la paiement en France des pensions acquises, soit par des Italiens, soit par des français, à la caisse nationale italienne, et réciproquement.

(*c*) "L'admission des ouvriers et employés de nationalité italienne à la constitution de rétraites de vieillesse et *peut être*, invalidité, dans le régime général

des rétraites ouvrières actuellement élaboré par le Parlement français, ainsi par la participation des ouvriers et employés de nationalité française au régime des rétraites ouvriers en *Italie, seront reglées aussitôt après le vote de dispositions* législatives dans les pays contractantes. . . . Les deux Gouvernements étudieront, pour les ouvriers et employés ayant travaillé successivement dans les deux pays pendant des periodes minima à determiner, sans remplir dans aucun des deux les conditions réquises pour les rétraites ouvrierés, un régime special d'acquisition de rétraite.

" (*d*) Les ouvriers et employés de nationalité italienne, victimes en France d'accidents par le fait ou à l'occasion du travail, ainsi que leurs représentants résidant en France, auront le droit aux mêmes indemnités que les français, et reciproquement.

" (*e*) L'admission des ouvriers et employés italiens en France à des institutions d'assurance ou de secours contre le chômage subventionnées en Italie aux institutions de même nature, sera règlée, par les pouvoirs public, l'admission des ouvriers et employés français, le cas échéant, après le vote dans les deux pays de dispositions légales relatives à ces institutions.

" Art. 3 : Au cas òu l'initiative serait prise par l'un des deux États contractants, ou par l'un des États avec qu'ils entretiennent des rélations diplomatiques, de convoquer divers Gouvernements à une Conférence internationale dans le but d'unifiez, par des conventions, certaines dispositions des lois protectrices des travailleurs, l'adhésion de l'un des deux Gouvernements au projet de Conférence entrâinerait, de la part de l'autre Gouvernement une réponse favorable en principe." [1]

The provisions of this Convention have been quoted at some length, because it is a novel attempt to apply reciprocally the laws of two countries, and because it has been followed by similar Conventions with a like object.[2]

On April 15, 1904, an agreement between France and Italy for regulating the payment of deposits into the French and Italian National Savings Banks, provides that funds paid in as savings, whether at the National Bank of France or the Post Office Savings Bank of Italy, may, up to a maximum of 1500 fr., be transferred from the one to the other on the demand, at any post office authorised to perform savings bank service, of the interested parties. The funds which are transferred shall in all respects, *e. g.* as to interest, conditions of repayment, etc., be regulated by the provisions under which the Bank in which the funds lie is governed. Provision is also made for the repayment in one country of money which has been placed in the Savings

[1] Martens, 2me Ser., 1895, p. 357.

[2] *Ibid.*, XXXIII. p. 521 (1906). M. Reynaud, *La Legislation internationale du Travail*, p. 71, describes this as " le premier traité du Travail."

Bank of the other country, but such payments must not exceed 1500 fr.

A Convention between Germany and the Netherlands was made on December 17, 1904. In the words of the preamble it seeks to regulate "die Bedingungen für die Niederlassung der Angehörigen de Niederlande im Deutschen Reiche und der Angehörigen des Deutschen Reiches in den Niederlanden, für die wechselseitige Unterstützung von Hilfsbedürftigen, sowie für die zwangsweise Überführung auszuweisender Personen über die beiderseitigen Landsgrenzen zu regeln." [1] By Arts. 1-3 the nationals of each contracting State are at liberty to settle in the other's territory, provided they have a passport, and provided if and so long as they observe the laws and police regulations. Each contracting State undertakes (Art. 4) to look after such needy members (hilfsbedürftigen Angehörigen) of the other Power as though they were nationals of the territory in which they find themselves. Each contracting Power (Art. 2) reserves the right to send back to their native country any undesirable immigrants, be they undesirable as being a menace to the State, or to the health or morals of the community, or because they have no means of support and have not sufficient strength to earn their living.

The Convention of April 15, 1905, between Belgium and the Grand Duchy of Luxemburg is the first of a series which reciprocally applies and assimilates the laws respecting workmen's compensation. The Convention is stated to be relative to "à la Réparation des Dommages résultant des Accidents du Travail"; its object, in the words of the preamble, being "d'assurer aux ressortissants de leurs États respectifs le bénéfice réciproque de la législation en vigueur sur la réparation des dommages résultant des accidents du travail." [2] Belgian nationals who meet with accidents arising out of their employment, as well as those claiming under them, shall enjoy the same benefits and guarantees as the subjects of Luxemburg, and, in like manner, the Luxemburg workmen shall be treated as French nationals (Art. 1).

[1] Martens, 2me Ser., XXXIII. p. 13.
[2] *Ibid.*, p. 334. See also XXXV. p. 233.

But (Art. 3) workers who are occupied only temporarily—*i. e.* for six months at most—in the territory of the State where the accident occurs, but who are attached to an enterprise situate in the territory of the other State, are excepted; the laws of the latter State alone shall be applicable. The provisions of the Convention are applicable to such persons as the laws of the respective contracting States "assimilent aux ouvriers," so far as relates to reparation for injuries resulting from accidents. Exemptions from stamp duty and other fiscal expenses relating to the documents, etc., employed for the purpose of such payment of compensation are to be reciprocal (Art. 5).

Convention of September 2 (1905) between Germany and Luxemburg relating to insurance against accidents. The accident insurance laws (save in the case of agriculture and forestry) follow such persons as go temporarily, *i. e.* for a period not exceeding six months, into the territory of the other country and are there employed. In the case of permanent residence the law of the place where the head offices of the undertaking are situated is to prevail.[1]

Convention, 1906 (February 21), between Belgium and France.[2] It follows the language of the agreement between Belgium and Luxemburg. It provides that Belgian subjects who meet with "accidents du travail" in France, and those claiming under them, shall enjoy all the benefits of the French law provided for French citizens as to indemnity, and *vice versa.* Exception is made in the case of a person occupied for at least six months in the territory where the accident occurs, and working on an enterprise directed from and established in the other State's territory,[2] in which case the law of the State containing the headquarters of the enterprise shall apply.

A Convention of June 27 (1906) between France and Luxemburg is similar in its provisions and its wording.[3]

A Covenant between France and Italy, signed on June 9, 1906, relating to compensation for injuries resulting from

[1] Martens, 2me Ser., XXXIII. p. 395.
[2] *Ibid.*, 3me Ser., XXXV. p. 148. See also p. 233.
[3] *Ibid.*, 2me Ser. XXXV. p. 279.

industrial accidents, likewise provides that the nationals of each Power who meet with accidents in the course of their employment on the territory of the other Power, as well as those claiming under them, shall have the same rights as the nationals of that other Power (Art. 1). The same rule is applied to claimants who do not reside in the country at the time of the accident or who afterwards cease to reside there (Art. 2). Instalments of the compensation may be paid through the consular officer.[1]

It is also provided that if an employer has made provision for Italian workmen with the French National Old Age Pensions Fund, payment may be made through the Italian National Workmen's Disablement and Old Age Provident Fund (Art. 6). Compensations falling due for total accidents incurred by French workmen in Italy may be deposited in a lump sum with the French Deposit Fund, which shall hold the amount at the disposal of the interested parties (Art. 7). Provision is made for the reciprocal recognition of fiscal exemptions.

1907 (August 27) Convention between Germany and the Netherlands relating to Accident Insurance. Undertakings to which the insurance laws of the two contracting States apply and which are domiciled in the territory of one State and carry on business within the territory of the other State, shall be subject, in respect of the business carried on within the territory of either State exclusively, to the accident insurance laws of that State (Art. 1).

In case of transport undertakings (Beförderungsbetriebe) carrying on operations across the frontier, the accident laws of the country where the business is domiciled (der Betrieb seinem Sitz hat) shall alone apply with regard to the travelling staff (Art. 2). Persons who are employees in an undertaking where insurance is compulsory by the laws of their own country shall, on being transferred to work in the other country, remain for six months subject to the accident insurance laws of the country where the firm is domiciled.[2] In administering the

[1] Martens, 3me Ser., I. p. 473.
[2] *Ibid.*, 3me Ser., I. p. 871 (1909).

accident insurance laws, the proper authorities shall give each other mutual assistance in determining the facts of any case (Art. 5).

Convention of July 3, 1909, between England and France, the provisions of which have been legalised by 9 Edw. VII. c. 16. The wording of this Convention is very similar to that of 1905 between Belgium and Luxemburg and the subsequent Conventions of 1906:—

(Art 1): "British workmen who meet with accidents arising out of their employment as workmen in France, and persons entitled to claim through or having rights derived from them, shall enjoy the benefits of the compensation and guarantees secured to French citizens by the legislation in force in France in regard to the liability of employers in respect of such accidents."

Reciprocal rights are granted to French citizens.

If a person, being engaged in a business which has its headquarters in one of the contracting States, be temporarily detached in the other contracting State and the accident occurs before he has been six months in such employment, then the persons interested shall only be entitled to the compensation provided by the law of the country where the headquarters are situated (Art. 2). The same rule also applies where a person is engaged in transport services and employed at intervals in the country other than that in which the headquarters of the business are established. The Convention is to remain binding until the expiration of one year from the date on which it shall have been denounced by one or other of the two contracting Powers (Art. 4).

French citizens are to be exempt from all expenses and fees in respect of acts done by the County Court in respect of these provisions (Art. 5). The Court makes arrangements respecting the payment of indemnity to the persons entitled thereto when such persons reside in France.[1]

With the establishment of systems of insurance for accidents, sickness and unemployment, and provision for old age in many countries, and most of the legislation on these subjects proceeding on similar lines, the probability is that treaties belonging to this third group will increase.

[1] Hertslet, XXVI. p. 129; Weiss, VI. p. 214, and *note*, p. 216.

Fourth Group

For a long time there was a general belief, even among sincere well-wishers of the improvement of workmen, that international efforts on their behalf on a large scale must be barren. Here and there was raised a solitary voice pleading for international agreements. But it was pretty sure to be the voice of some one discredited as a visionary. Robert Owen, who with all his eccentricities, colossal egotism, and persistent pushing of social nostrums too simple to be remedies for complex evils, was before his time in regard to this as to many other matters, addressed to the Allied Sovereigns at Aix la Chappelle in 1819 remarks in which he urged international action in regard to labour. A few voices were from time to time raised in support of labour treaties. But nothing came of these appeals. "The idea of the universal and higher development of Labour Legislation," says Dr. Bauer, "was even in the last decade of the nineteenth century rejected by some teachers of International Law as an invasion of the rights of Nations by Socialism, and as Utopian." Eminent economists derided the idea of the practicability of labour treaties. "Can we imagine General Caprivi or the Marquis of Rudini addressing diplomatic notes to the Quai d'Orsay for the carrying out of international arrangements concerning the length of the working day? Let us not harbour ideas which are delusions or at least premature. Such agreements will be more difficult to formulate and scarcely less dangerous in their application than a general disarmament treaty signed in Paris or Berlin."[1] So wrote, in 1890, M. Leroy Beaulieu. His words

[1] Quoted by Dr. Bauer in *International Labour Legislation and the Society of Nations*, p. 8: "J'avoue que cette législation commune et internationale me paraît un rêve assez chimérique. Je croirais plutôt à la paix universelle, à l'arbitrage universel, qu'à ces lois internationales pour règler ce travail des fabriques." M. Leroy Beaulieu referred to the difficulties experienced by civilised nations as to arrangements in regard to commerce and coinage. "Pour une législation internationale du travail, les difficultés sont infiniment plus considerables. Les raisonnements qui l'on fait à ce sujet ne tiennent aucun compte de la différence de force et de précocité des êtres humains dans les divers pays et sous les divers climats. . . . Puis il ne doit être question de la durée du travail mais aussi de son intensité. . . . Les différences d'intensité,

read strangely to-day, when the great majority of Governments are seeking by means of a section of the League of Nations—the only section which so far has shown much vitality—to accomplish what then seemed to many, beside M. Leroy Beaulieu, an impossibility.

But in extenuation of his distrust it is fair to recollect that the first efforts at united action on the part of Governments were feeble and futile. The Conference called at Berlin in 1890 by the ex-Kaiser, and attended by representatives of fifteen Governments, led to no direct results. It revealed difficulties which then appeared insuperable, though from it dates in several countries the real beginning of labour legislation on modern lines, and it may be said that the Conference helped to define with precision the exact nature of these difficulties. And here let me note an earlier failure of an even more ambitious attempt. The first International Association of Working-men, which was formed in 1863–64 in London, under the auspices of Karl Marx, set before it as its aim a great achievement.[1] It proposed no less an achievement than the uniting of workmen of all European countries in an effort to convert the world into an *Arbeiterstaat*, or Super-Labour State. To attain this object, they were told, they must not be diverted from their goal by patriotism; for the proletarian has no country, only a birthplace. All Socialists are comrades, whatever be their nationality. "The subjection of the man of labour to the man of capital lies at the bottom of all servitude, all social misery, and all political dependence."

The leaders of the movement had in view "die Unterordnung aller besonderen Ziele unter das gemeinsam Klasseninteressen des ganzen Proletariats." For a time the International Association appeared to prosper. Its organisation spread from country to country. It gained a footing here. It obtained the support

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de travail sont un obstacle insurmountable à ces naif projets de protection internationale des travailleurs. . . . Qu'on renonce donc à des projets qui, à moins que l'humanité change, ce qui ne pourrait être l'œuvre que de plusieurs siècles, n'ont aucune chance de réalisation prochaine; qu'on se garde d'ennerver trop l'industrie par des lois excessives." (Clunet, 1889, p. 184.)

[1] The exact share of Marx in the foundation of the International is matter of controversy. See Guillaume, *Karl Marx, Pan-germaniste*, 1915.

of the London Trades' Council. But it became identified with the Commune, the suppression of which was its death-blow.

The way was opened for united action by methods pacific and gradual; much preparatory educational work was accomplished by a series of important International Congresses of which the first were held in Brussels and Zurich; in Paris in 1889, in London in 1896, in Brussels and Zurich in 1897; in Paris, 1900, in Stuttgart in 1907, and London in 1913. At the meeting in 1900 a great step forward was taken by the establishment of a bureau of labour and a secretariat at Brussels, and by the foundation of the International Labour Association in 1901. No doubt certain new influences have of late greatly favoured unity of action. With uniformity in the technical and economic conditions of production and transportation, with increased development of large industrial establishments and communication, there has come also greater knowledge of the conditions of labour in different countries; perhaps I am justified in saying that there is an abatement of jealousy, and a clearer conception of the existence of common interests. Had Governments not moved in the matter—had it been left entirely to workmen themselves—I am inclined to think there would have been new forms of united action. The age of Labour Conventions, not merely between two States, but between many, and with objects more comprehensive than those of the Conventions above described, was at hand.

The fourth group consists of Conventions entered into for the benefit of workmen presumably contracting on terms of equality with their employers;[1] between States professing to apply common standards, and seeking to equalise conditions of labour, and to prevent underselling by employers subjects of States indifferent to hygienic conditions and laxly administering their Factory Acts, if they had any. The first, and so far the only, successful attempt to further these aims was made by two International Labour Conventions on September 26, 1906. One of these, prohibiting night work for women in Industrial Employment, is now signed by the following fourteen Governments:

[1] Hertslet, XXVI. p. 278; Treaty, Ser. 21, 1910.

The German Empire, Austria-Hungary, Belgium, Denmark, Spain, France, the United Kingdom, Italy, Luxemburg, the Netherlands, Portugal, Sweden and Switzerland. Night work shall be prohibited for all women, without distinction of age, in all industrial undertakings in which ten or more men or women are employed. The prohibition does not apply to establishments where only the members of the occupier's family are engaged. Each State must define for itself " industrial employment," but the national legislation should distinguish between industries and agriculture and commerce. A night rest of eleven hours (part of which must be between 10 p.m. and 5 a.m.) is guaranteed to each woman. Night work may be allowed in case of exceptional interruption of the work (i. e. *force majeure*) or when perishable materials are in the course of treatment. A reduction of the night rest to ten hours on sixty days in the year is also allowed where the industries are seasonable or should any exceptional circumstances arise.

The administrative arrangements for the execution of the Convention is thus left to each State, which binds itself to enforce the regulations agreed upon and to exchange by diplomatic channels all laws, orders and official reports on their application. Other Powers may join this Convention by an " acte " addressed to the Swiss Federal Council. The Colonies may join by notice to the Motherland. The Convention is to come into force after two years; but in those States where night work of adult women is not regulated, the period of uninterrupted rest may, for a maximum of three years, be limited to ten hours.[1]

The other Convention[2] of September 26, 1906, was directed against a clamant evil productive of a particularly terrible disease, necrosis. It was signed by the following Powers: the German Empire, Denmark, France, Italy, Luxemburg, the Netherlands, and Switzerland. It prohibits the manufacture, importation, and sale within their territories of matches in the

[1] According to the report prepared by the Organising Committee for the Washington Meeting, several of our colonies, many of the American States, Denmark, Japan, Norway, Poland, Roumania, Serbia and Siam, have not adhered to this Convention.

[2] Hertslet, XXV. p. 692; list of accession, Hertslet, XXVI. p. 285.

manufacture of which white (yellow) phosphorus is employed. The Convention is to come into force three years after the ratifications are deposited and to remain in force for five years, then to be terminable by one year's notice. The regulations regarding the joining of other Powers and the Colonies and of the organisation of administrative arrangements are similar to those in the preceding Convention.

If the League of Nations becomes a reality—and in particular if the mandatory Articles are put into operation—such Conventions may come under the supervision and review of the Council. Art. 23 binds the members of the League to secure and maintain fair and humane conditions of labour for men, women and children, both in their own countries and in all countries to which their commercial and industrial relations extend, and for that purpose will establish and maintain the necessary international organisations.

League of Nations and Labour Conventions

Even if no new machinery had been formed, if only the course of events since, say, 1904 had been continued, there was strong probability that the labour laws of the world would become in many respects much the same; without concert on the part of Governments, there was a general movement towards uniformity. But a new situation, favourable to assimilation, has been created by the Covenant of the League of Nations, and the Articles in the Treaty of Peace dealing with labour.

The preamble of these Articles contains a strong condemnation of the existing economic order—is notable, indeed wholly unique, as the united expression of many Governments. It states that—

"whereas conditions of labour exist involving such injustice, hardship, or privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled, and an improvement of those conditions is urgently required: as, for example, by the regulation of the hours of work, including the establishment of a maximum working day and week; the regulation of the labour supply; the prevention of unemployment; the provision of an adequate living wage; the protection of the

worker against sickness, disease and injury arising out of his employment; the protection of children, young persons and women; provision for old age and injury; protection of the interests of the workers when employed in countries other than their own; recognition of the principle of freedom of association; the organisation of vocational and technical education and other measures;"

in short, the programme of State Socialism.

The Peace Conference on January 25, 1919, passed at Paris a resolution to the effect that a Commission of two representatives of each of the five Great Powers and five representatives of the other Powers at the Peace Conference be appointed to "inquire into the conditions of employment from the international point of view, and to consult the international means necessary to secure common action on matters affecting conditions of employment, and to recommend the form of a permanent agency to continue such inquiry and report thereon in co-operation with or under the direction of the League of Nations." The Commission, having been nominated, set to work to prepare a report embodying certain principles and a constitution and defining methods of working.

There was much difference of opinion as to the principles to be adopted as to labour. Not a few of the delegates preferred the "Labour Charter" adopted by the International Trade Unions Conference at Berne, in February 1919, which contained many drastic proposals; *e. g.* "higher education should be established in all countries and should be free and accessible to all." "Emigrant workers shall enjoy the same rights as the workers of the country into which they immigrate, as joining and taking part in the work of trade unions, including the right to strike." The American delegates submitted proposals which included suggestions of a political character; *e. g.* the incorporation of the "fourteen points laid down by President Wilson"; the universal application of trial by jury; recognition of the rights of small nations to determine their political status, together with some startling economic changes; *e. g.* "the sale or use for commercial purposes of articles made or manufactured in private houses shall be prohibited." Many of these suggestions were put aside as being either impracticable or at present not ripe for adoption.

In the end the Peace Conference, at its plenary session on April 11, 1919, agreed to the following :—

" The High Contracting Parties, recognising that the well-being, physical, moral and intellectual, of industrial wage-earners is of supreme international importance, have framed a permanent machinery associated with that of the League of Nations to further this great end.

" They recognise that differences of climate, habits and customs, of economic opportunity and industrial tradition, make strict uniformity in the conditions of labour difficult of immediate attainment. But, holding as they do that labour should not be regarded merely as an article of commerce, they think that there are methods and principles for regulating labour conditions which all industrial communities should endeavour to apply, so far as their special circumstances will permit.

" Among these methods and principles the following seem to the High Contracting Parties to be of special and urgent importance :—

" *First.*—The guiding principle above enunciated, that labour should not be regarded merely as a commodity or article of commerce.

" *Second.*—The right of association for all lawful purposes by the employed as well as by the employers.

" *Third.*—The payment to the employed of a wage adequate to maintain a reasonable standard of life, as this is understood in their time and country.

" *Fourth.*—The adoption of an 8-hours' day or a 48-hours' week as the standard to be aimed at where it has not already been attained.

" *Fifth.*—The adoption of a weekly rest of at least 24 hours, which should include Sunday wherever practicable.

" *Sixth.*—The abolition of child labour and the imposition of such limitations on the labour of young persons as shall permit the continuation of their education and assure their proper physical development.

" *Seventh.*—The principle that men and women should receive equal remuneration for work of equal value.

" *Eighth.*—The standard set by law in each country with respect to the conditions of labour should have due regard to the equitable economic treatment of all workers lawfully resident therein.

" *Ninth.*—Each state should make provision for a system of inspection, in which women should take part, in order to insure the enforcement of the laws and regulations for the protection of the employed.

" Without claiming that these methods and principles are either complete or final, the High Contracting Parties are of opinion that they are well fitted to guide the policy of the League of Nations; and that, if adopted by the industrial communities who are members of the League, and safeguarded in practice by an adequate system of such inspection, they will confer lasting benefits upon the wage-earners of the world."

In the ordinary course followed at international meetings, votes would be given by national units. But, in view of the possible conflict of interests between the members of the same national unit, it was decided that the employers' and workpeople's

delegates should be entitled to speak and vote independently of their Government; a decision which opens up the possibility of groups formed of delegates of different nationalities, and of decisions not according to national lines. To name another point as to which differences of opinion were revealed: the French, American, Italian and Cuban representatives maintained that each of the three parties (Governments, employers and workpeople) should have equal voting power. The British, Belgian and other delegates pointed out that this was not business. The object in view was not merely to pass abstract resolutions, but to propose draft conventions which the various Governments would present to the legislative authorities. "It was essential that the Government should have at least an equal voice, otherwise it might often happen that conventions adopted by two-thirds majority of the Conference would be rejected by the legislatures of the various States, which would have the effect of rendering the proceedings of the Conference nugatory." In the end the British proposal was adopted by a narrow majority. There was also a division of opinion as to the adoption and ratification of draft Conventions agreed upon by the International Conference. Originally the suggestion was that any Convention adopted by a two-thirds majority must be ratified by every State participating, unless within one year the national legislature should have expressed its disapproval of the draft; it being desired to require each Government to give the legislature the opportunity of expressing its opinion on measures adopted by a two-thirds majority. The French and Italian delegates would have gone further; States should be bound to ratify such Conventions, whether the legislatures approved them or not, subject to a right of appeal to the Executive Council of the League. The Council might invite the Conference to reconsider its decision, but if it were reaffirmed, there would be no right of appeal. The majority of the Commission, shrinking from this serious invasion of the sovereign rights of States, were content to adopt the following resolution: "Each of the members undertakes that it will, within the period of one year at most from the closing of the session of the

Conference, or if it is impossible owing to exceptional circumstances to do so within the period of one year, then at the earliest practicable moment, and in no case later than eighteen months from the closing of the session of the Conference, bring the recommendations or draft Convention before the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action"; a resolution probably prudent in the initial experimental stage. Indeed in the apparently innocuous form which I quote, it failed to attain the assent of the delegates of Federal States, and for cogent reasons.

In the case of the United States, for example, the Federal Government would not, even if they could, accept the obligation to ratify Conventions dealing with matters within the competence of the forty-eight States of the Union, with which the power of labour legislation now rested. Nor could the Federal Government guarantee that the constituent States, even if they passed the necessary legislation to give effect to a Convention, would put it into effective operation, or provide against the possibility of such legislation being declared unconstitutional by the supreme judicial authority. It is, according to some federal constitutions, *e.g.* the Argentine, within the powers of the provincial legislatures to make treaties as to certain matters (Art. 107); and no promise by the Federal Government could fetter their action.

The Covenant (Art. 387) creates certain machinery:—

A General Conference representative of the Powers to be held from time to time and at least once a year; an International Labour Office (Art. 388) controlled by a Council of twenty-four members and a Director (Art. 393). The Conference shall be composed of four representatives of each of the members, of whom two shall be Government delegates and the other two shall be delegates representing respectively the employers and the workpeople of each of the members. Each delegate may be accompanied by advisers, who shall not exceed two for each item on the agenda of the meeting. The members undertake to nominate non-Government delegates and advisers chosen in agreement with the industrial organisation, if such organisation

exist, which are most representative of employers or workpeople, as the case may be, in their respective countries. The governing body of the International Labour Office shall consist of twelve persons representative of the Governments; six persons elected by the delegates to the Conference representing the employers; six persons elected by the delegates to the Conference representing the workers. The duties and functions of the office are thus described (Art. 10):—

"The collection and distribution of information on all subjects relating to the international adjustment of conditions of industrial life and labour, and particularly the examination of subjects which it is proposed to bring before the Conference with a view to the conclusion of international Conventions and the conduct of such special investigations as may be ordered by the Conference."

In short, there is to be a permanent organisation for the framing of Labour Conventions. Obviously the Conference thus constituted has very marked peculiarities distinguishing it from all other international bodies. Not merely are there non-Government members with rights equal to the Government representative; but the members are not bound to vote according to the vote of the nation to which they belong. There is nothing to prevent a labour delegate from voting against the other delegates of his own Government. Conceivably the employers' delegates or the workmen's, going their own way, might join in resolutions not acceptable to their Governments. In point of fact, there was cross voting at Washington. A further novelty is the fact that, unlike ordinary Congresses or Conferences, the Conference contains avowed representatives of "interests," that is to say, delegates chosen in agreement with industrial organisations. It is also to be noted that the General Conference of the labour organisation is quite distinct from the General Assembly of the League of Nations. So much for the general scheme, its objects and the machinery intended to give it effect.

The first meeting, held at Washington last October and November, was attended by 123 delegates representing some forty nations, including the chief Eastern States. Seventy-three were Government delegates. The employers and workmen

had each twenty-five representatives, assisted by 150 advisers. At the first meeting of the annual Labour Conference, held last August in Washington, the subjects dealt with were :—

(1) Application of principle of the 8-hours day or of the 48-hours week;

(2) Question of preventing or providing against unemployment;

(3) Women's employment—

  (*a*) Before and after childbirth, including the question of maternity benefit;

  (*b*) During the night;

  (*c*) In unhealthy processes.

(4) Employment of Children—

  (*a*) Minimum age of employment;

  (*b*) During the night;

  (*c*) In unhealthy processes.

(5) Extension and application of the International Convention adopted at Berne in 1906 on the prohibition of the use of white phosphorus in the manufacture of matches.

The Committee adopted, by eighty-two votes against two, the principle of the 8-hours day and the 48-hours week. They passed resolutions prohibiting the work of women for at least four weeks after childbirth, and their employment in night work, by ninety-four votes to one. They also adopted draft Conventions prohibiting the employment of children below the age of fourteen (ninety-one votes to three), and of night work of young persons under eighteen (ninety-three for, none against). They also urged the adhesion of all members of the League to the Convention of 1906 prohibiting the use of white phosphorus in the manufacture of matches.

On the whole, the results of the Conference were, according to universal testimony, satisfactory. The anticipated conflict of interests was not found to be obstructive of all business. The Japanese representatives were accommodating and ready

to fall into line with Western delegates; a disposition which was met by a recognition of the economic peculiarities of the East.[1]

The Future of the Conference

He would be a bold man who tried to foretell how much of an ambitious programme will be fulfilled by the Conference. I am hazarding much in suggesting even possibilities or probabilities. The General Conference may prove to possess no real power; its resolutions, when not vague, may be inoperative. The International Labour Office, assumed to be the really working body, may become a place where statistics, more or less instructive, are collected and deposited. The Conferences may be used by some Governments as a convenient instrument for escaping responsibility and postponing decisions as to embarrassing questions. The resolutions of the Conference, even if approved by Governments, mean only a promise to introduce measures by them within a year, or at most eighteen months; measures which may not recommend themselves to Parliament, or which may be adopted subject to reservations or amendments varying from country to country. We cannot look for the rapid expulsion of racial antipathies and prejudices. At Versailles, a reservation declaration of racial equality was rejected. The mutual advantage of free immigration and emigration is challenged by those to whom in 1858 that principle seemed clear. Western democracy may continue to mean a white aristocracy. There are possibilities, too, of conflict in regard to the work of women, who may insist that for equal work there should—in fact, not merely in theory—be equal remuneration, and that if they are excluded from certain employments (*e. g.* in mines) for which they are deemed unfit, men should be excluded from other employments for which women are peculiarly fit. If ruled by experts, the Conference may be cut

[1] "The test was a severe one, and I think there is general agreement that the scheme came through it successfully. . . . The delegates in all the groups were animated by a real desire to bring about an improvement in the conditions of labour in accordance with the spirit of the Treaty of Peace" (Sir Malcolm Delevingne on "the International Regulation of Labour and the Peace Treaty."

off from the formative forces which called it into being, and which will seek an outlet elsewhere and otherwise. On the other hand, if it shows initiative and vitality—and of this there are signs—it may come into conflict with organisations eager for direct or rapid action. Inasmuch as the national labour delegates are free to vote against their own Governments, the Conference may be committed to measures which the latter disapprove. It may be a centre of reaction or a stronghold of revolutionary movements. Of course it may, in whole or in part, escape all these perils, and in the main fulfilling expectations, it may prove a valuable organisation. I will not attempt to predict which of these possibilities is most probable. But I am hopeful as to the potency of forces which will utilise the machinery now created.

"Vitality," says an observer possessed of altogether exceptional knowledge of international labour movements, "seems to me the most hopeful feature of the new organisation. Even if the League of Nations should collapse, it strikes one as very unlikely that the labour organisation will be allowed to die with it." [1]

Much which seemed doubtful was accomplished at Washington. The antagonism between representatives of the East and West did not prove insuperable. It is significant that Japan "adhered" to the Convention as to the employment of women without any modification. The conciliatory spirit of the Conference was shown in regard to hours of employment. The unqualified adoption by Japan of the Convention on this subject was not pressed upon Japan. The transitional state of industry was recognised. The Commission to which was referred the application of this Convention to particular countries recorded its opinion that "the Conference might request the Japanese Government to take into consideration the possibility of applying the provisions of the main Convention within a period of five years after the coming into effect of the modified Convention," and the Government even promised to make every effort to

[1] See the paper by Miss Sophy Sanger, *Transactions of the Grotius Society*, V. p. 145.

accelerate the unqualified adoption of the rule in harmony with the general trend of the world.

"Perhaps," says Sir Malcolm Delevingne, understating rather than overstating the significance of the acceptance by the Japanese delegates of the propositions as to the employment of women and young persons, "no more remarkable advance has ever been made at one stride in the regulation of labour conditions." I base my hopes on wider grounds than the experience of the first meeting. De Tocqueville noted as a characteristic of the French Revolution, that it resembled in many respects—in its wide extension, in its proselytising spirit, its propaganda methods, its disdain of local traditions or customs, its influence beyond frontiers, and its cosmopolitanism—a great religious rather than a political movement. Something similar may be discerned in recent labour movements spreading over the whole civilised world: primarily for economic aims, but recalling by their methods the chief religious movements of the past.

Conspiring with new ideas, giving them shape and driving force, have been enormous industrial changes; the creation of factories and workshops ever larger which bring together masses of men with common interests; the substitution of joint-stock companies, operating through managers and agents, for private individuals; the gradual elimination of the small producer, previously often indistinguishable from workmen; and, to name a change which brings one near to the immediate subject of this paper, the internationalisation of labour in more senses than one—first, in the sense that labour can move more freely from country to country; that emigration is possible where it lately was not; that there are new means of intercommunication between the workers of different countries; and secondly, that by the experience of foreign service multitudes have acquired the knowledge that external circumstances—failure of crops or wars abroad—determine wages and profits. The many conferences and congresses of workmen have given them insight into a world outside their own, and have prepared the way for international agreements as to labour.

In regard to concentration, labour has of late faithfully kept

step with capital. There has been similar organisation in both. To the elimination of the small producer, the stifling of competition, the creation of the trust, the cartel, and all the many forms of monopoly, national and international, correspond the growing power of unions, their federation and joint or sympathetic action, the international labour organisations, and the weakness of the "free labourer."

Among the working classes of almost all civilised countries is a new sense of unity; it may not be very profound or continuous; it does not bear severe strains; it often, nay generally, proves weaker than patriotism. But it exists, and grows, and will bear fruit. The labour movements of our time are already, as much as any political movements, international. It will become more and more so now that there exists, in a sense, an International Labour Parliament which meets annually, and to whose resolutions Governments are pledged to give heed. Everywhere flows a strong current which may help also to give impetus to the work of the International Labour Conference. Call, as many do, the new spirit and process visible the socialisation of law; call it the transfer to the State of new duties; call it a larger outlook on the part of rulers as to the true permanent interests of society, there is a demand for results not to be achieved by *laissez faire* or patriotic isolation, but only by concert and co-operation between States. Everywhere are discernible the rudiments of a common policy as to labour; perception of the evils and necessary failures, if each community goes its own way. That policy may find in the new permanent organisation an instrument for the framing of Labour Conventions more potent than its authors anticipated, and in ways not foreseen by them. The League will not control the Labour Conference; and, if the former fails—perhaps just in proportion as it fails—to fulfil its purpose, the power of the latter will grow, and it will become more and more a true International Labour Parliament.

HEINRICH LAMMASCH

(May 21, 1853—January 7, 1920)

By W. R. BISSCHOP, D.C.L.

By the death of Prof. Heinrich Lammasch Europe lost one of its most prominent champions of international arbitration as a means for settling disputes between states without having recourse to the arbitrament of war. From the beginning of the twentieth century this great international jurist has worked steadfastly in the direction of such a peaceful solution of international differences, and his endeavours found recognition far beyond the frontiers of his own country.

Lammasch was born of an old Austro-German stock on May 21, 1853, at Seitenstetten in Lower Austria, where his father practised as a lawyer. Having taken his degree in 1876 as *Doctor juris utriusque* in the University of Vienna, he travelled the following year through Germany and England, became a little later Lecturer (*Privatdozent*) and in 1882 Extraordinarius Professor of Criminal Law and Procedure in the Law Faculty of the University of Vienna. During this period he wrote his first publications, viz.: in 1879, a treatise on Attempt at Crime (*Ueber den Versuch des Verbrechens*) and in 1882 a book on Extradition (*Ueber die Auslieferung*), which was translated into French. In 1885 Lammasch became Ordinarius Professor at the University of Innsbrück, where he remained until 1889, when he accepted the Chair of Ordinarius Professor of Criminal Law and Procedure, International Law and Philosophy of Law, at the University of Vienna.

While Lammasch at first felt rather inclined towards the traditional view of criminal law as a field for philosophic and speculative study, his first experience of English institutions

brought him round towards the more practical side of modern criminology and its applicability in legislation.

One of the first fruits of his change of view was an essay published in 1878, on the Reformatory School of Redhill in Surrey, which was at that time a great achievement in this special field of Social and Criminal Reform. Professor Lammasch became the most influential teacher of Criminal Law in Austria, and turned his special attention towards the much-required reforms in legislation and administration of Criminal Law and Procedure. At the same time he devoted a great part of his literary work to support the development of international relations, in so far as they regard criminal law, which has been so prominent during the last thirty years. By a great number of essays, articles, and treatises published in the leading scientific reviews of Germany, Austria, and France, he took a prominent part in the reform movement in both Criminal and International Law. He published in 1886 a treatise on the Duty of Extradition and the Right of Asylum (*Auslieferungspflicht und Asylrecht*), and in 1887 an essay on International Treaties on Legal Assistance (*Rechtshilfevertrage*) in Holtzendorff's *Handbuch des Völkerrechts*. In 1894 he published his Outline of Austrian Criminal Law (*Grundriss des Oesterreichischen Strafrechts*).

Mostly through Lammasch's exertions a draft Penal Code, which was then being prepared in Austria, and which followed mainly the antiquated German theories without taking note of the modern ideas of Criminal Law, was withdrawn and the work was recommenced on an entirely new basis. He was then a member—afterwards President—of a special commission for drafting a new Penal Code. In 1909 a new Draft Code was published which embodied in many parts the best ideas and results of foreign progressive legislation.[1]

In 1899 he became a member of the Upper House in Austria, and in the same year he was selected as one of the representatives of his country at the first Peace Conference at the Hague.

[1] Prof. Redlich, in *Journal of Comparative Legislation*, New Series, Vol. XXIV. pp. 209–10.

It was not until his mission to the Hague that Lammasch obtained an opportunity to show his deep knowledge and wide views on matters of international law which in a very short time made him one of the most characteristic figures in the world of international lawyers and not only an exponent of the theory of the law of nations, but the practical builder and interpreter of that law which we all hope will one day be the foundation of intercourse between nations.

From the very commencement of the Hague Conference Lammasch was one of those who seriously contemplated the object of that Conference and the wide scope to which it could lead in the possibility of the development of arbitration as a settlement of disputes between nations. From that moment he used all his force and endeavours towards the promotion and amelioration of that subject, and from that moment he took his place as a pacifist amongst international lawyers, or rather as one of those who believed in the possibility of a peaceful solution of international difficulties. Never did his mind give way to submission to a pacifism of practical impossibility. He remained a scholar, studying the possibility of a development in any such direction from a strictly scientific point of view.

This he showed in his publication, *Die Lehre von der Schiedsgerichtsbarkeit in ihrem ganzen Umfang* ("The doctrine of the possibility of arbitration in its full capacity"), and *Die Rechtskraft internationaler Schiedssprüche* ("The force of law of international arbitration"), which was published by the Nobel Institute.

As soon as the Court of Arbitration was founded the Austrian Government placed Lammasch's name on the list of those who might be selected as Arbitrators in international arbitrations. Four times Lammasch has had the honour of being elected as such, and in three cases out of the four he presided over the Court. It was as President of the North American Fisheries Arbitration Court that he became most known to the lawyers of this country and of America, and full appreciation was given to the great characteristics which he displayed on that occasion.

As Sir Erle Richards, who then appeared as one of the Counsel

for the Crown before him, wrote in *The Times* of January 12, 1920: "Lammasch presided over the proceedings with infinite tact and courtesy, and his wide outlook and great knowledge of international relations impressed all those concerned in the case. It was no doubt largely due to these abilities that we settled the complicated questions involved finally, and, I think both sides will agree, fairly."

The first time he was chosen to take his place in the Hague Tribunal was in 1903, when he, together with the Russian lawyer, F. de Martens, was a member of a Court presided over by the Russian Minister, N. V. Moerawieff, to hear the claim of Germany, Great Britain, and Italy to preferential treatment in the payment of damages due by Venezuela after the blockade of the Venezuelian coast in 1902. The Court decided in favour of the three blockading Powers.

In 1905 Lammasch was again called to the Hague, this time to preside over a Court consisting of himself, Melville W. Fuller, Chief Justice of the United States of America, and Jonkheer A. F. de Savornin Lohman of Holland, to decide the question which had arisen between France and Great Britain regarding the right of France—in view of the Declaration of March 18, 1862—to allow the Sultan of Mascat's subjects to carry the French flag on their vessels, regarding the privileges and immunities which the possession of such flag carried with it and regarding the question how far these privileges and immunities affected the jurisdiction of the Sultan over his own subjects.

In 1910 followed the arbitration in the dispute between this country and the United States of America as to the North American fisheries, a dispute of some ninety years' standing, which had more than once brought the great seafaring nation of Europe and the United States of America to the verge of war. The Court over which Lammasch presided consisted of Jonkheer A. F. de Savornin Lohman, the Hon. George Gray, Judge of the United States Circuit Courts of Appeal, the Hon. Sir Charles FitzPatrick, Chief Justice of Canada, and the Hon. Louis M. Drago of Buenos Ayres. It does not seem necessary to review this case at any length, Lammasch's merits being

sufficiently apparent from the words of Sir Erle Richards quoted above.

In the autumn of the same year the last Court of Arbitration of which Lammasch formed a member and over which he presided, assembled at the Hague to examine the award of M. Barge regarding the compensation due to the subjects of the United States by the Venezuelan Government and to give a final decision on any points of difference. With him sat as members of this Court Gonzalo de Quesada of Cuba and the Belgian statesman, A. Beernaert.

The interruption of the work of the Hague Arbitration Court and the impossibility for a third Peace Conference to inaugurate the Peace Palace at the Hague ended the career of Lammasch in this direction, and prevented him from further leading Europe on the road to pacific solution of international difficulties. No doubt, his work at the Hague has not a little assisted in establishing the fame of the Hague Arbitration Court and faith in international arbitration itself. Lammasch was a leader in the promotion of good understanding between nations and the elimination of all possible causes of international friction. As the *Temps* expressed it recently, he was "*un des esprits les plus distingués de l'Europe pacifiste.*"

This he showed *inter alia* by his attitude against sensationalism in the Press and his attempts to prepare international action for its suppression. In Austria his activity in this direction led to the insertion of a new delict in the Austrian Penal Code, viz. the penalty for endangering good relations with a foreign Power by spreading false reports in the Press.

In 1887, at Heidelberg, the *Institut de Droit International* had elected him as *Associé*. In 1891 he became a member of that aristocratic body. The Carnegie Foundation made him a member of their Council in Europe, and the American Society of International Law chose him as one of their honorary members. On June 10, 1914, the University of Oxford honoured him in its own distinguished fashion by creating him a Doctor of the Civil Law, *honoris causa*.

In 1902 the Austrian Government chose him as adviser to

accompany the Austrian representatives at the International Sugar Conference at Brussels, which by common consent of all States represented at that Conference abolished all sugar export bounties. In 1906 he was reporter of the Franchise Reform Committee of the Upper House. Five years later (in 1911) Vienna honoured its great citizen by extending to him the freedom of that city.

It needs little imagination to understand that at the outbreak of the war a man of such character was a thorn in the flesh of the military party in his own country. In fact, he had a narrow escape from being put in prison, and the realisation only that such an act of folly would have blamed them irretrievably in the eyes of the world seems to have withheld the militarists from acting according to their wishes.

As a member of the Austrian Upper House Lammasch had always taken a lively interest in the politics of his country, in the same liberal spirit which characterised his actions towards other nations.

Although the antagonism of the military party might temporarily check his influence, it did not succeed in damping his ardent spirit. As soon as opportunity arose, he concentrated his endeavours on hastening the moment when a just and permanent peace could be made. He openly opposed the German militarists and their mania of world conquest, gave publicity in the Austrian Press of what was said by men like Wilson and Grey regarding a League of Nations, and fought the annexationist party in the Upper House whose idea was to join Germany in an all German State.

On January 26, 1917, he wrote regarding the first attempts of Wilson to mediation: "No State falls short of its honour, if it makes a peace based on equality and mutual co-operation in the interests of all. But the person who first holds out his hand shows the greatest merit towards humanity."

His exertions reached their climax when in the Upper House on February 28, 1918, in the face of wild opposition on the part of his fellow-members, he made his famous speech advocating a peace by mutual agreement, which met with great approval

outside his country and by certain parties within. When, on that occasion he reproached his political adversaries that they did not represent the Austrian nation and their answer was that he did not do so either, his short retort was : " I feel with the people." That was so. The next day the Socialist Seitz confirmed this in the House of Representatives : " What Lammasch has said in the Upper House reflects, indeed, the ideas and the feelings of the mass of the population," he said, and he expressed his deep-felt gratitude that his political adversary had shown the courage to fight in the Upper House for so noble a cause and for the interests of the mass of the nation.

It was Lammasch's great ambition that Austria should play, among the Central Powers, the same rôle as Wilson with the Allies, and that thus through the United States and Austria a *rapprochement* of the belligerents should be obtained.

Already in the summer of 1917 the Emperor Karl tried to make Lammasch his Prime Minister, but his intentions were frustrated by the militarists. Not until October 16, 1918— after the Emperor had issued his Proclamation whereby Austria was made into a Commonwealth of free nations—did he succeed in entrusting Lammasch with the formation of a cabinet to carry out the formation of a Federal State. It was too late. The military situation was already in full dissolution. The time of governing of the Emperor Karl had passed. On November 12, 1918, he abdicated, and with him disappeared his Prime Minister. Thus ended Lammasch's career as a statesman.

After the Armistice Lammasch retired to Switzerland, where he used what influence was left to him to obtain somewhat favourable terms for his sorely-tried fatherland. His last appearance in public was as a member of Austria's delegation to Versailles in order to receive the conditions of Peace for Austria. Though greatly disappointed with the provisions of the Peace Treaty, he seriously set to work to co-operate in the resurrection of his country, when death overtook him on January 7, 1920.

Lammasch has to a large extent been a victim of the circumstances under which he lived and which prevented him more than once from attaining the goal of his ambitions. Had fate

been more friendly towards him, no doubt Europe might have been the richer for the achievement of plans which can ultimately only succeed through their being handled with courage, tact and a high-minded spirit.

To posterity in Austria the name of Lammasch will go down as that of a courageous, high-minded patriot, and the last Prime Minister of the Old Empire. In the history of the world his name will remain a symbol of a great endeavour to lead humanity out of the labyrinth of anarchy into the precincts of an orderly and properly organised civilised society.

THE LATE DOCTOR T. J. LAWRENCE

By Professor A. PEARCE HIGGINS, C.B.E., LL.D., Whewell Professor of International Law in the University of Cambridge and Professor of International Law in the University of London.

The Reverend Thomas Joseph Lawrence, LL.D., Hon. Canon of Salisbury Cathedral, and Rector of Upton Lovel, Wilts, who died after a short illness on August 16, 1919, had for many years held an important place in the ranks of International Lawyers. His death at the present juncture is especially regrettable, for the world can ill afford the loss of one who brought to bear on all departments of International Law the application of the highest standards. His former pupils, of whom there must be many scattered throughout the world, will recall, with gratitude, his zealous work as a teacher; and those to whom he was known only by his writings—a still larger number—will render homage to the memory of one whose work was characterised by lucidity of expression, clearness of thought and accuracy of presentation. The writer of this notice, in particular, has special reasons for gratitude to the late Dr. Lawrence: it was from him that he received his first instruction in the Law of Nations, and from the time that he attended his lectures as a Freshman in Downing College, he received from him ungrudging aid and encouragement in his pursuit of the study of this subject.

Lawrence was born on April 23, 1849, at Cambridge, and was educated at the Perse Grammar School in that town; thence he passed to Downing College, where he had a career of extraordinary brilliancy in the University of Cambridge. He won a Whewell Scholarship in International Law in 1868, on the occasion of the first examination for these Scholarships which had recently been established under the will of Dr. William Whewell, Master of Trinity. In 1871 he was Senior in the Moral Science

Tripos, and in the following year he was bracketed Senior in the Law and History Tripos, a record which is believed to be unique in Cambridge annals. His election to a Fellowship and Lectureship at Downing followed almost immediately, but in accordance with the then existing Statutes, he vacated his Fellowship on his marriage in 1876. He was ordained Priest in 1874; and soon afterwards he was appointed to the College Living of Tadlow, which was sufficiently near to Cambridge to enable him to continue to lecture there. In 1883, Sir William Harcourt ("Historicus"), the first Whewell Professor of International Law, appointed Lawrence as his Deputy, and this appointment was renewed annually till 1887, when Sir William Harcourt resigned the Chair, in which he was succeeded by Sir Henry Maine, notwithstanding Lawrence's strong claims. Some of the results of his work as Deputy-Professor are to be found in a volume of *Essays on Disputed Points of International Law*, published in 1884. In one of these essays Lawrence outlined a scheme for the neutralisation of the Suez Canal; and four years later he had the satisfaction of seeing these principles adopted in the Suez Canal Convention, 1888. In 1891 he proceeded to the degree of LL.D. in the University of Cambridge. In 1892 he accepted an appointment as Professor of International Law and History in the University of Chicago, but he only remained there two years. Soon after his return to England he was appointed to the Rectory of Girton, which enabled him to resume his lectures in the University of Cambridge, where he taught International Law to large classes until his acceptance of the Rectory of Upton Lovel in 1902.

In addition to his work in Cambridge he was for many years Lecturer on Maritime International Law to Officers of His Majesty's Navy, first at Greenwich and for a short time at the Royal Naval War College at Portsmouth. He also undertook occasional courses of lectures for the Cambridge University Extension movement, with which from its commencement he was in ardent sympathy.

Some little time after his leaving Cambridge the University of Bristol created for Lawrence the honorary post of Reader in

International Law, and in that capacity he delivered short courses of lectures. Downing College elected him to an honorary Fellowship in 1908, and he was elected to full membership of the Institut de Droit International in 1910, and he was made a Justice of the Peace for Wiltshire in the same year. Shortly before his death the Bishop of Salisbury appointed him to the Prebendal Stall of Wilsford and Woodford in his Cathedral.

A list of Lawrence's published works bears witness to his great success as a writer. The *Handbook of International Law* reached a tenth edition in 1918; the *Principles of International Law* reached the sixth edition in 1913. *War and Neutrality in the Far East*, a series of valuable essays on the Russo-Japanese War, ran into two editions. In 1908 he published a short account of the work of the Hague Conferences under the title of *International Problems and Hague Conferences;* and in 1914 a volume of *Documents Illustrative of International Law*. The two small volumes, called respectively *The Society of Nations, its Past, Present and Future* and *The League of Nations*, published in 1919, contain the ripest fruits of his labours. He was a strong supporter of the idea of the League of Nations. It is true that he saw dangers ahead, for he was too well acquainted with the history of past efforts with this object; he also saw the dangers which awaited the League from its opponents as well as from its too zealous friends. But his faith in the ultimate goodness of humanity and his firm belief in the triumph of right made him an effective exponent of the new endeavour to solve the age-long problem.

Lawrence was a clergyman as well as an international lawyer. Like Grotius, he predicated for the basis of international relationships the fundamental principles of Christian ethics. He was a Liberal in politics and an ardent reformer, and though he often chafed at the slow grinding of the wheels of progress, he never slackened his own efforts or spared himself in any cause which he believed to be just. As an International Lawyer he adopted the positive standpoint; but while advocating changes where such appeared to him to make for better international relationships and to be more in harmony with justice, he never confused

existing rules of law with the ideal. He had a firm grasp of legal principles and he applied them to international problems with rare lucidity. How deep an impression he made on foreign jurists as a typical British exponent of International Law may be seen by the constant references to his work made by such a writer as Prof. Charles Dupuis in his *Droit de la Guerre maritime*.

Lawrence lived a busy life, full of good and hard work which received little or no recognition of a material character; but to the last he remained a stalwart fighter for justice for the weak and oppressed, whether nations or individuals. The great secret of the success of his work (for success in the highest sense of the word was certainly his), lay in his unswerving honesty of purpose and in his devotion to the great ideal of improving the methods for the peaceful settlement of international disputes.

A. P. H.

DR. PITT COBBETT

A FURTHER breach has been made in the ranks of international lawyers by the death of Dr. Pitt Cobbett, Emeritus Professor of Law in the University of Sydney, N.S.W. The late Professor was educated at Dulwich and at University College, Oxford (where he successfully coached in law), and shortly after taking his degree went to Australia as Law Professor at Sydney. He made no signal contribution to the science of International Law in the shape of any comprehensive treatise on the subject, but he will long be remembered by his *Leading Cases on International Law*, first published in 1885, and reaching a third edition in two volumes in 1909. This was an admirable and most useful work. It was far more than a mere collection of cases. The method employed was to summarise the statement of facts and the consequent decision, and then to use the case as a basis for an examination of the general question of International Law which it raised. In this way the commentaries with which Dr. Cobbett enriched the leading decisions given in his book were full of erudition on the subject of International Law, and were marked by qualities of clear and powerful thought and lucid expression. It is a matter for great regret that Dr. Pitt Cobbett was not spared to give us yet another edition of his *Leading Cases* which would have included the supremely important decisions of the Courts of this country, notably in the Court of Prize, on questions bearing upon or connected with International Law.

C. M. P.

LIST OF INTERNATIONAL AGREEMENTS, 1919–20.

[This List is unofficial, and almost certainly incomplete, as some engagements to which Great Britain is not a party are only incidentally reported to this country. The date is ordinarily that of the signature, and not of the ratification, of the instrument.]

Date (1919).	Country or Countries.	Other Contracting Parties.	Nature of Act.	Subject of Act.
1 Jan.	Luxemburg	Germany	Withdrawal	from Treaty of Oct. 20–25, 1865 (Customs Union), and Convention of Nov. 11, 1902 (Luxemburg Railways).
9 Jan.	Australia, Norfolk Island, Papua	Switzerland	Withdrawal	from Arts. 9 and 10 of Treaty of Sept. 6, 1855 (Commerce, Friendship and Reciprocal Establishment).
25 Jan.	Spain	General	Ratification	of Opium Convention of Jan. 28, 1912.
30 Jan.–13 June	U. K.	Greece	Agreement	Parcels in closed mails.
1 Feb.	Norway	U.S.A.	Prolongation	of Treaty (except Arts. 13 and 14) of July 4, 1827 (Commerce and Shipping.
[14 Feb.		General	Draft Agreement	League of Nations.]
18 Feb.	Belgium	Greece	Denunciation	of Arrangement of Oct. 19–Nov. 1, 1904 (Commerce).
26 Feb.	Iceland	General	Accession	to Convention of July 5, 1912 (Radiotelegraphy).
3 March	Greece	U.K.	Denunciation	of Treaty of Nov. 10, 1886, Agreement of March 28, 1890, with Amending Declaration of June 16, 1890, and Declaration of Nov. 23, 1904, with supplementary Declaration of May 17, 1905 (Commerce).
8 March	Netherlands	U.S.A.	Renewal	of Convention of 1908 (Arbitration).
8 March	Spain	U.S.A.	Renewal	of Convention of 1908 (Arbitration).
10 March	France	U.K.	Denunciation	of Art. 2 of Convention of Sept. 18, 1897 (Tunis, Commercial).
18 March	Poland	General	Accession	to International Telegraph Union.
20 March	Italy	U.S.A.	Renewal	of Convention of 1908 (Arbitration).
28 March	U.K.	Chile	Treaty	Establishment of a Peace Commission.

Date (1919).	Country or Countries.	Other Contracting Parties.	Nature of Act.	Subject of Act.
30 March	Czecho-Slovakia	Serb-Croat-Slovene State	Treaty	Trade.
2 April	Hayti	General	Accession	to Geneva Red Cross Convention of July 6, 1906.
12 April	Bolivia	Venezuela	Treaty	Arbitration.
22 April	Belgium	Netherlands	Convention	Addition to General Convention of Sept. 19, 1907.
27 April	Siam	Germany	Denunciation	of all Treaties.
27 April	Siam	Austria-Hungary	Denunciation	of all Treaties
15 May	U.K.	France	Arrangement	modifying Agreement of Aug. 24, 1917 (Import Restrictions).
13 June	U.K.	Belgium	Agreement	British War Graves in Belgian territory.
16 June	Azerbaijan	Georgia	Treaty	Defence.
17 June	Serb-Croat-Slovene State	General	Accession	to Convention of July 5, 1912 (Radiotelegraphy).
20 June	U.K.	Spain	Treaty	Extradition between certain British Protected States in Malay Peninsula and Spain.
23 June	Paraguay	Spain	Treaty	Extradition.
28 June	Allied and Associated Powers	Germany	Treaty and Supplementary Protocol	Peace.
28 June	British Empire U.S.A., France, Belgium	Germany	Agreement	Occupation of Rhineland territories.
28 June	U.K.	France	Treaty	Assistance to France in case of unprovoked aggression of Germany.
28 June	British Empire, U.S.A., France, Italy, Japan	Poland	Treaty	Peace.
28 June	Poland	General	Accession	to Geneva Red Cross Convention of July 6, 1906.
3 July	Germany	Esthonia	Treaty	Peace.
3 July	U.S.A.	Venezuela	Convention	Commercial Travellers.
18 July	Costa Rica	Mexico	Convention	Diplomatic Mail-bag Service.
28 July	Tonga	U.S.A.	Denunciation	of Treaty of Oct. 20, 1886 (Friendship, Commerce, and Navigation).
8 Aug.	U.K.	Afghanistan	Treaty	Peace.
8 Aug.	Czecho-Slovakia	General	Accession	to Industrial Property Convention of 1883, with Additional Act of 1900, and Washington Convention of 1911.
9 Aug.	U.K.	Persia	Agreement	Future relations.
13 Aug.) 25 Sept.	Mexico	Spain	Agreement	Parcels Posts.
19 Aug.	U.K.	France	Agreement and Regulations	Exchange of Postal Parcels subject to Trade Charges.
22 Aug.	France	Italy, Switzerland	Convention	Simplon-Orient Express.

Date (1919).	Country or Countries.	Other Contracting Parties.	Nature of Act.	Subject of Act.
30 Aug.	U.K.	France	Prolongation	of Declaration of Dec. 15, 1915 (Military Jurisdiction).
10 Sept.	Allied and Associated Powers	Austria	Treaty	Peace.
10 Sept.	Allied and Associated Powers		Agreement	Italian Reparation payments.
10 Sept.	Allied and Associated Powers		Agreement	Contribution to cost of liberation of former Austro-Hungarian territories.
10 Sept.	Principal Allied and Associated Powers	Serb-Croat-Slovene State	Treaty	Future relations.
10 Sept.	Principal Allied and Associated Powers	Czecho-Slovakia	Treaty	Future relations.
10 Sept.	GENERAL		Convention	revising General Act of Berlin of Feb. 26, 1885, and General Act and Declaration of Brussels of July 2, 1890.
10 Sept.	Allied and Associated Powers		Convention	Trade in arms and ammunition.
10 Sept.	GENERAL		Convention	Liquor Traffic in Africa.
10 Sept.	France	Switzerland	Denunciation	of Agreement of Oct. 20, 1906 (Commerce), and Treaty of Feb. 23, 1882 (Establishment).
15 Sept. / 17 Nov.	Czecho-Slovakia	General	Accession	to Geneva Red Cross Convention of July 6, 1906.
19 Sept.	France	Japan	Prolongation by Notes	of Arts 5–7 and 17 of Convention of Aug. 19, 1911 (Commerce).
20 Sept.	Norway	Spain	Renewal	for three months of Conventions of 1892 and 1903 (Commerce).
22 Sept.	Sweden	General	Ratification	of International Copyright Convention of Nov. 13, 1908, and additional Protocol of March 20, 1914.
24 Sept.	U.K.	France	Agreement	Conveyance of mails by aeroplane.
27 Sept.	U.K.	France	Withdrawal	from Agreement of Aug. 24, 1917, and May 15, 1919 (Import Restrictions).
30 Sept.	Italy	France	Treaty	Immigrant workmen from the two countries.
3 Oct.	Hayti	U.S.A.	Protocol	Establishment of Claims Commission.
10 Oct.	Queensland	Belgium	Withdrawal	from Anglo-Belgian Modus Vivendi of 1898.
20 Oct.	U.K.	Belgium	Ratification	of Agreement of Feb. 3, 1915 (Boundaries in E. Africa).

Date (1919).	Country or Countries.	Other Contracting Parties.	Nature of Act.	Subject of Act.
22 Oct.	Germany	Poland	Agreement	Commerce and economy.
8 Nov.	U.K.	Norway	Renewal	of Convention of Aug. 11, 1904 (Arbitration).
9 Nov.	U.K.	Sweden	Renewal	of Convention of Aug. 11, 1904 (Arbitration).
11 Nov.	Finland	Sweden	Exchange of Notes	Validity of Treaties between Russia and Sweden relating to Finland.
16 Nov.	U.K.	Portugal	Renewal	of Agreement of Nov. 16, 1914 (Arbitration).
17 Nov.	Japan	Paraguay	Treaty	Friendship and Commerce.
20 Nov.	Poland	General	Adhesion	to Industrial Property Convention of 1883.
21 Nov.	Chile	U.S.A.	Convention	Posts.
27 Nov.	Allied and Associated Powers	Bulgaria	Treaty and Protocol	Peace.
27 Nov.	Greece	Bulgaria	Convention	Reciprocal emigration.
27 Nov.	Argentine Republic	Spain	Convention	Workmen's compensation for accidents.
5 Dec.	Serb-Croat-Slovene State	General	Accession	to Treaty of Peace with Austria, and Treaty of Principal Allied and Associated Powers with Serb-Croat-Slovene State, etc., all of Sept. 10, 1919.
8 Dec.	General		Declaration	modifying Agreement of Sept. 10, 1919 (Allied and Associated Powers) as to cost of liberation of former Austro-Hungarian Territories.
8 Dec.	General		Declaration	modifying Agreement of Sept. 10, 1919 (Allied and Associated Powers), as to Italian Reparation payments.
9 Dec.	Principal Allied and Associated Powers	Roumania	Treaty	Future relations: boundaries.
13 Dec.	Norway	Portugal	Denunciation	of Treaty of Dec. 31, 1895, and additional Convention of April 11, 1905 (Commerce).
28 Dec.	South Africa	General	Accession	to Rome Agreement of Dec. 9, 1907 (International Office of Public Health).
30 Dec.	Australia	General	Accession	to Convention of Sept. 26, 1906 (White Phosphorus).
30 Dec.	India	General	Accession	to Convention of Sept. 26, 1906, (White Phosphorus).
31 Dec.	Ecuador	U.S.A.	Convention	Commercial travellers.
31 Dec.	Nicaragua	U.S.A.	Convention	Commercial travellers.
31 Dec.	Germany	Sweden	Prolongation	until March 31, 1920, of Commercial Treaty expires Dec. 31, 1919.

Date (1920).	Country or Countries.	Other Contracting Parties.	Nature of Act.	Subject of Act.
3 Jan.	Argentine Republic	France	Denunciation and renewal	of Commercial Treaty of Aug. 19, 1892, for recurrent periods of three months.
10 Jan.	Czecho-Slovakia	General	Accession	to International Telegraph Union.
7 Feb.	Austria	Poland	Agreement	Treatment of property of Austrian and Polish nationals in each other's territory.
12 Feb.	U.K.	Russia (Soviet Government)	Agreement	Exchange of prisoners.
16 March	Germany	Switzerland	Renewal	of Commercial Treaty of 1904 for recurrent periods of three months.
16 March	Poland	General	Accession	to Berne Copyright Convention of 1886.
29 March	France	Canada	Denunciation	of Commercial Conventions of 1907 and 1909.

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CASES DEALING WITH INTERNATIONAL LAW DECIDED BY THE ENGLISH COURTS DURING THE PAST YEAR

By ANDREW ERIC JACKSON, LL.D., O.B.E., Solicitor.

Cases dealing with Public International Law decided by the English Courts during the past year, as was to be expected during the first year following the end of the War, have been chiefly concerned with Naval Prize. Most of the cases before the Prize Courts have dealt with contraband and have presented few points of legal interest. The most interesting in its facts was the group of cases tried together known as the *Dirigo* (1919, p. 204) in which the Crown was able to place before the Court a quantity of intercepted and decoded letters and messages showing the means taken by the German Government to import commodities from America in the first two years of the War through neutral countries, and the arrangements made to divert neutral vessels and goods by capture or otherwise to German ports after they had reached the Baltic. The case was also interesting because the Crown argued that goods being enemy property were not protected from condemnation by Article 2 of the Declaration of Paris, though the neutral ship carrying such goods might be protected by the Declaration from capture and detention. It was further argued that the words " with the exception of contraband of war " in the same Article referred to the quality of the goods only and not to their quality and destination. Lord Sterndale rejected both contentions, holding that the neutral flag protected enemy goods except contraband of war from condemnation as well as from capture, and that to be contraband of war the goods must have an enemy destination as well as warlike uses. The *Dirigo*, which was carrying a full cargo of contraband with an ulterior enemy destination, was condemned, following the decision of the Privy Council in the *Hakan* (1918, A.C. 148), on the ground that the owners had knowledge of the character and destination of the goods, but Lord Sterndale expressed the opinion that it was desirable that the Privy Council should consider the meaning of their judgment in the *Hakan*.

The meaning of the decision in the *Hakan* was also before Lord Sterndale in the case of the *Ran* (1919, p. 317), in which he held that the owners of the ship, who had chartered her for a voyage from America to Scandinavian ports, were not bound by the acts of the charterers and that in the absence of proof that they or their Master were aware that a quantity of the cargo (rubber which had been falsely described in the Bill of Lading and Manifest as " gum " and had been condemned because it had an enemy destination) was misdescribed or had an enemy destination, the ship was not liable to condemnation. In a recent decision (The *Kim*, 36 T.L.R., p. 562) Sir Henry Duke, however, distinguished the *Ran* and condemned three ships which were on time charter, and captured whilst carrying contraband during the currency of the time charters, but he found that

the Masters of each of the vessels were actively concerned in carrying the contraband, and that the owners of two of the vessels had knowledge of the voyages on which their ships were engaged. In the *Prins der Nederlanden* (Lloyd's List Law Reports, Vol. 2, p. 568), Sir Henry Duke has still further extended the immunity of a neutral shipowner in the absence of proof of his knowledge of the character of the goods carried by him, holding that the owners of this steamship were entitled to receive from the Crown the freight on a quantity of cocoa carried from Las Palmas to Amsterdam and condemned as contraband by Sir Samuel Evans. The grounds of the decision were that the Prize Court had a discretion to allow freight on contraband goods in exceptional cases, and the neutral shipowner had a right to ask the Court, upon recognising his innocence of complicity in the contraband transaction, to direct that he shall receive payment of freight. Sir Henry Duke seems to have thought that in the circumstances the shipowner had no clear remedy against the shipper or holder of the Bill of Lading for his freight.

In the *Edna* (1919, p. 157) Lord Sterndale had to consider the meaning of Article 56 of the Declaration of London, by which " the transfer of enemy vessels to a neutral flag effected after the outbreak of hostilities is void unless it is proved that such transfer was not made in order to evade the consequences to which an enemy vessel as such is exposed." The *Edna*, which just before the outbreak of War had been transferred to the German flag, was after the outbreak of war transferred to the Mexican flag, which she had previously been flying. She was at once used by her nominal owners, a Mexican Company managed and owned by a Captain in the German Naval Reserve, for the purpose of carrying a cargo of coals for the German cruiser *Leipzig*, which she succeeded in doing. She was subsequently requisitioned by the Mexican Government, and eventually sold to an American Company, and captured whilst flying the American flag. Lord Sterndale held that Article 56 was only pointed at colourable transfers, and that as the American owners had purchased the vessel *bona fide* for their own purposes the transfer was not made in order to evade the consequences to which an enemy vessel was exposed.

The case was complicated by the double transfer, first to the Mexican and then to the American flag, but the decision, that if the neutral purchasers are *bona fide* the object of the vendor is immaterial, seems to abolish the onus apparently placed upon the new owner by Article 56, and on the facts there can be no doubt that the transfer from the German to the Mexican flag took place to avoid the consequences to which the *Edna*, whilst flying the German flag, was exposed.

Lord Sterndale further held, following the *Alwina*, that the *Edna* was not an auxiliary of the German fleet, and that as she had not been captured whilst carrying contraband to the *Leipzig* she must be released.

In the *Hamborn* (1919, A.C. 993) the Privy Council decided, upholding the decision of Sir Samuel Evans, that in considering the enemy character of a vessel apart from Article 57 of the Declaration of London the Court could look behind the actual flag which the ship was entitled to fly. The *Hamborn* was registered in Holland and owned by a Dutch Company, which had been incorporated before the war and which had owned the *Hamborn* from the day of its incorporation. The company, however, was entirely under the direction and control of Germans resident in Germany, and it was held that it must be treated as a German Company and the vessel was accordingly condemned as a German ship.

There were several cases during the course of the year dealing with territorial waters.

In the *Düsseldorf* (1919, p. 245) it was held that a German vessel which was captured just within three miles of two small pieces of land separated from the mainland of Norway by a narrow passage of water which dried at low tide was captured in territorial waters, and the vessel was released to the Norwegian Government, but without damages or costs, as it was held that the officers of H.M. Ship had no intention of violating territorial waters.

In the *Pellworm* (35 T.L.R., 719) it was held that where vessels were stopped outside territorial waters but had drifted into Dutch territorial waters before they could be boarded, the capture of the vessels was not complete until the boarding parties had taken possession, and that the ships must be released to the Dutch Government.

Sir Henry Duke has since held (36 T.L.R., p. 539) that the value of the *Pellworm* and the other vessels which were lost after seizure owing to enemy action whilst under requisition by the Crown, need not be restored to the Dutch Government, on the ground that the Dutch Government would only be trustees of the sums of money representing the vessels for the German owners, and that under the Treaty of Versailles the interests of the German owners in such sums of money had been transferred to the Crown. He had previously held in the case of the *Valeria* (1920, 36 T.L.R., p. 201), that the unintentional encroachment of the captors upon neutral waters in making a capture gave the neutral state no claim for restitution in value or damages when the captured vessel had not been brought into port. The *Valeria* was a German steamer captured in Norwegian territorial waters. Lord Sterndale had ordered her release to the Norwegian Government, but she had been sunk after capture by her captors, as they found it impossible to bring her into a British port.

In the *Bernisse* and *Elve* (1920, p. 1), the question arose as to the right of a belligerent to send into port for inquiry and examination neutral vessels which were stopped on the High Seas and concerning which there was nothing immediately suspicious in the ship's papers or cargo. The *Bernisse* and *Elve* had sailed from a French Colonial port for Rotterdam, but were taking a course round the north of Scotland. They had received no pass from the British Government exempting them from calling at a British or other port in accordance with the Order in Council of February 16, 1917. They were stopped by a cruiser and sent into Kirkwall for examination and inquiry, and on the way to Kirkwall one of the vessels was sunk and the other damaged by a German submarine. Lord Sterndale held that there was no justification for sending the vessels into Kirkwall for inquiry, and therefore the captors must make restitution of the damage suffered by the Dutch owners, notwithstanding that the vessels had been attacked by a German submarine without any warning or examination whatsoever.

In the *Svithiod* (Lloyd's List Law Reports, Vol. 2, p. 440) the Privy Council reversed a decision of the Exchequer Court of Canada, and held that a neutral vessel was not liable to condemnation on the ground of unneutral service, when the only service proved was the attempt to give a passage from Pernambuco to Denmark to a German sailor, who was the third officer of a German steamer, the *Blucher*, which had taken refuge in Pernambuco at the outbreak of war, and had remained there to avoid capture at sea, notwithstanding that the Master had

attempted to conceal the presence of such sailor on board when the vessel was detained at Halifax.

Most of the other cases decided have dealt with the meaning of the Order in Council of October 29, 1914, and the extent of the exemption given therein to neutrals by the British Government from condemnation of conditional contraband on its way to Germany. Such cases appear to be of interest only to claimants in the Prize Court, as the wording of the Order in Council and the exemptions given thereby are hardly likely to be followed in any future wars. Other cases have dealt with the meaning of the Retaliatory Orders in Council.

In the *Leonora* (1919, A.C. 974) the Privy Council had to consider the validity of the Retaliatory Order in Council of February 16, 1917. They confirmed the judgment of Sir Samuel Evans, holding, following their own decision in the *Stigstad* (1919, A.C. 279), that retaliation was not contrary to the Law of Nations, and, upon the evidence in the *Leonora*, that the particular Order in Council was not invalid as subjecting neutrals to unreasonable inconvenience, having regard to the circumstances. The *Leonora*, which was a Dutch vessel carrying a cargo of coals, the produce of Belgian collieries in German occupation, on a voyage from Rotterdam to Stockholm was condemned with her cargo.

The chief decisions in English Courts other than the Prize Court raising points of public international law have been in the Admiralty Court.

In the *Annette* (1919, p. 105) the status of a provisional Government of Northern Russia was considered, and it was held that, as the provisional Government had not been formally recognised by H.M. Government as the Government of a sovereign independent State, vessels in the services of the provisional Government were not immune from the jurisdiction of the British Court.

In the *Gagara* (1919, p. 95) the Court of Appeal upheld a decision of Hill, J. that a vessel in the possession of the Esthonian Government, which had been recognised for the time being by H.M. Government, was immune from the jurisdiction of the British Court.

In the *Porto Alexandre* (1919, 36 Times Law Reports, 28) the Court of Appeal also confirmed the decision of Hill, J. that a vessel belonging to the Portuguese Government was exempt from the jurisdiction of the British Courts although the vessel was employed in ordinary commerce.

The exemption of ships from the ordinary jurisdiction of the British Courts by reason of their being owned by Foreign State Departments seems to require further consideration or, if necessary, legislative action. A perusal of Lloyd's Register shows the enormous number of such ships, more particularly belonging to the United States of America through the United States Emergency Fleet Corporation. Many of these vessels are at present engaged in trading under ordinary charters, and the immunity granted to such vessels by the British Court is a great inconvenience to the merchants to whom they are chartered, and to salvors or owners of vessels, with which they collide; whilst the immunity granted to them in this country is not, it is believed, granted to them in the American Courts.

BOOKS RECEIVED [1]

A Handbook to the League of Nations, by Sir Geoffrey Butler, K.B.E. With an Introduction by the Rt. Hon. Lord Robert Cecil, K.C., M.A. (Longmans, Green & Co., London, etc., 1919.) 5*s*. net.

In this admirable book Sir Geoffrey Butler sets out and explains the constitution and machinery of the League. The book deserves, and will doubtless attain, a wide circulation not only among international lawyers, but, it is hoped, among the general public as well.

Transactions of the Grotius Society, Vol. V: "Problems of Peace and War." (Sweet & Maxwell, Ltd., London, 1920.) To non-members, 6*s*. net.

The papers printed in this volume are a valuable contribution to the literature of international law. They cover a wide field and help to mark the welcome transition to the legal problems of peace.

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[1] In future years detailed reviews of books on International Law will form a regular feature of the Year Book.

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